SUPREME COURT, U. S.

946

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN WOODY
and
192 ADDITIONAL PLAINTIFFS-APPELLANTS,

vs.

STERLING ALUMINUM PRODUCTS, INC.,
and
INTERNATIONAL ASSOCIATION OF MACHINISTS
and
DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LOCAL LODGE NO. 41 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LARRY CONNORS, DIRECTING BUSINESS REPRESENTATIVE, DISTRICT NO. 9, I. A. OF M.,
and
RUSSELL DAVIS, BUSINESS REPRESENTATIVE, DISTRICT NO. 9, I. A. OF M.,
Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioners, John Woody and 192 co-employees and co-petitioners for and in behalf of the machinist employees of the respondent company, pray that a Writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on September 2, 1966, and affirmed by an Order denying petitioners' petition for rehearing entered on October 11th, 1966.

OPINIONS BELOW.

The District Court below entered two opinions. A memorandum opinion was filed in the United States District Court on January 21st, 1965, and is reported in 244 F. Supp. 84. A second memorandum opinion was filed on July 1st, 1965, and is reported in 243 F. Supp. 755. The opinion of the Eighth Circuit Court of Appeals is reported in 365 F. 2d 448 (8th Cir. 1966). A copy of the Court of Appeals opinion is appended to this petition as Appendix "A" (infra, pages 9 to 23).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 12th, 1966. A timely petition for rehearing was filed and is appended to this petition as Appendix "B" (infra, pages 24 to 31). This petition for rehearing was denied on October 11th, 1966. The jurisdiction of this Court is invoked under the act of June 25, 1948, c. 646 (1), 62 Stat. 928 (1); U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Does this Court's mandate in Republic Steel v. Maddox, 85 S. Ct. 614 (1965), allow a unit of individual employees, who have been abandoned by their Union, to invoke the Grievance Procedure provisions of their labor agreement in order to bargain and/or arbitrate with their employer by and through their duly elected Chief Steward and Stewards, regarding the termination of their employ-

ment and the re-location of the manufacturing plant where they were employed?

2. What remedial forum does this Court designate for prosecution of a claim for damages against a Union by its members for a breach of the Union's duty of fair representation?

STATEMENT OF THE CASE.

Petitioners are 193 former employees of the respondent Sterling Aluminum Co. Each petitioner was also a member of the respondent District Lodge No. 9, I. A. M. A. W. and related Local Lodge No. 41, I. A. M. A. W. labor organizations. The respondent District Lodge No. 9, I. A. M. A. W., held the exclusive bargaining rights for and in behalf of the petitioners as machinist employees of the respondent Sterling Company. The terms and conditions of the petitioners' employment were governed and controlled by a labor agreement which was executed by the Sterling Company and District Lodge No. 9, Machinist Union, and which expired on February 28, 1963. The Sterling Aluminum Products Company is an interstate manufacturer.

Petitioner, John Woody, and certain other petitioners are the duly elected Chief Shop Steward and Shop Stewards of the Machinist Union employee unit of the Company (R. 147, paragraph (c)).

The disputes and this litigation arose because of a claim by the employees that their Union had conspired with the company to include certain clauses in the labor agreement which purportedly gave the Company the right to relocate the St. Charles, Missouri plant and terminate the employment of the machinist employees (R. 128 to 131, sub-paragraphs (e), (f) and (g)). This contract was executed by company and Union officials on March 1, 1961

to remain in effect for a period ending February 28, 1963 (R. 63).

The Union sent notices to the Company in December 1962 of its intention to negotiate a contract to replace the agreement expiring on February 28, 1963, including Union proposals to be taken up in contract barganing (R. 91, 154 to 160). The Company notified the Union of its intention to shut down the St. Charles plant after receipt of the Union's proposals (R. 89 and 153). These petitioners were not advised by their Union officers of the notification received by the Union of the Company's intention to shut down the St. Charles, Missouri plant (R. 131, subparagraph (i)).

The proposals sent by the Union to the Company to be taken up in bargaining were intended to prevent the Company from terminating the employment of these petitioners in the event of a shutdown and re-location of the St. Charles, Missouri plant (R. 155, paragraph No. 1; 156, paragraph No. 7; 156, paragraphs Nos. 10 and 11). The Company refused to bargain on any of these proposals (R. 89, Exhibit "B"; R. 160, Exhibit 1 (g); R. 161, Exhibit 1 (h); R. 162, Exhibit 1 (i)).

The Chief Shop Steward, Woody, sent letters to his Union officials seeking their assistance and attention to the grievances which were pending and unsettled (R. 163, Exhibit No. 2, and R. 164 to 166, Exhibits 2 (a) and 2 (b)). A grievance was filed by Chief Steward Woody on February 28th, 1963, the day on which the plant shut down (R. 190, 191, Exhibit No. 3 (h). Note reference to this grievance in R. 166, first paragraph, Woody letter to International Union President). The Union finally refused to act on these grievances (R. 175, 176, Exhibit 2 (j), and R. 176, 177, Exhibit 2 (k)).

On September 13th, 1963, this action was instituted by the employees against the company and the Union.

REASONS FOR GRANTING THE WRIT.

Petitioners will treat the reasons why the writ is prayed in the opposite order from which this petition sets out the "Questions Presented". This for the reason that the decisions of the Fifth Circuit Court of Appeals in the case of Local 12, Rubber Workers Union v. N. L. R. B., 63 LRRM 2395 (1966), and in N. L. R. B. v. Local 1367, International Longshoreman's Ass'n (as yet unreported, decided on December 5th, 1966), in their four cornered conflict with the holding of the Second Circuit Court of Appeals in the case of N. L. R. B. v. Miranda Fuel Co., 326 F. 2d 172 (1963), present the amazing conflict of the federal appeals courts on the question of the proper jurisdictional forum for the presentation of a claim of breach of a Union's duty of fair representation far more eloquently than the ruling of the Eighth Circuit Court of Appeals in its decision in this case (R. Appendix "A", 14 and 15). So that these petitioners can clearly state their position in the asserted claims against their Union,[1] we squarely rely upon the decision of Judge Medina in the Second Circuit Miranda opinion. The claims against this respondent Union and its officers are "private wrongs . . . as a result of tortious conduct" (Miranda, 326 F. 2d 172 at 180). These petitioners have been abandoned by this so-called union and they want to stay abandoned. They are more than content to have their constitutional day in court before a jury of their peers and will gladly present their case of wrongdoing by this fiduciary agent under the rules of evidence and abide by a determination of money damages by that jury.

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[1] Petitioners have obviously irritated the courts below with their pleading style in the second amended complaint (R. Appendix "B", page 2). This irritation, whether justified or otherwise, is the sole responsibility of the draftsman. It can have no possible bearing on the merits of the claims which these petitioners seek to have adjudicated.

These petitioners fully recognized when they filed their lawsuit in September, 1963, that the weird and collusive machinations of their employer and their Union had sunk them into what appeared to be a bottomless legal snake pit. Now, almost three and one-half years later, they have the light of this court's opinions, in December, 1964 in Fiberboard, etc. v. N. L. R. B., 85 S. Ct. 398, and in January, 1965 in Republic Steel v. Maddox (supra), to guide their efforts in seeking a remedy for wrongs perpetrated by their employer in refusing to bargain its unilateral decision to terminate their employment and relocate the plant where they had contracted to earn their living.[2] Since the advent of these two decisions petitioners have consistently pleaded in the courts below to allow them to exercise their mandatory, broad form contract grievance apparatus against the employer and to stay the tort proceeding against the Unions (R. 118 to 121, Plaintiff's Motion for New Trial on Count III; R. 137 and 138, paragraphs 8 and 9 of Plaintiff's Second Amended Complaint; R. 146 to 148, Plaintiff's Motion for Summary Judgment).

The great obstacle, in the opinions of the courts below, to enforcement of the mandatory grievance procedure in this case is apparently the fact that these petitioners are attempting this litigation without the blessing and approval of their benighted Union. They have consistently been classified as "individual employees." Several inferential factors must be clearly focused at this point which serve to remove from these petitioners the dreaded onus which the categorizing of "suit by individual employees" has come to connote in the field of national labor law. First, they are 193 strong and represent practically

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[2] This litigation is companion in some respects (especially at this point) to the case of Brown, et al., v. Sterling Aluminum Co., 365 F. 2d 651 (8th Cir. 1966). A petition for certiorari is pending in the Brown v. Sterling, etc., case.

the entire unit affected by the failure of the employer to bargain in advance of the re-location of the plant (R. 79 and 80); Second, their class includes the all important Chief Shop Steward and Shop Stewards required by the labor agreement Grievance Procedure Article (R. 40, Step 1 and Step 2) to initiate bargaining over a contract grievance. Third, this lawsuit is against both the employer and the Union and alleges a conspiracy by these two parties to the labor agreement to deprive these petitioners of their contractual and legal rights. Petitioners pointedly suggest that this conspiritorial conduct is a glaring example of the "sweet harmony (that) develops between the two (the employer and the Union) that proves a bitter lockout of the solitary employee who finds his contractual rights going unprotected," which so troubled Circuit Judge Clark in his concurring comment in Belk v. Allied Aviation (315 F. 2d 513 at 517, 2nd Cir. 1963, cert. den. 84 S. Ct. 102).

In summary of the reason for granting this Writ in the affirmative answer to Question No. 1 of this petition these 193 solitary employees have attempted to fulfill every requirement specified by this Court's teaching in Maddox v. Republic Steel. They would welcome the opportunity to exhaust their internal grievance procedures. They are legally equipped and competent to do so. They will entrust the procedural arbitrability disputes herein to the competence of the arbitrator. They need the order of this Court to bring their reluctant employer to the bargaining table with them and to further hold their Union in the anteroom to await the decision of the arbitrator and its affect on the determination of its fate in the ensuing tort action.

CONCLUSION.

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

JEROME J. DUFF.

Certificate of Service.

State of Missouri, } ss.
City of St. Louis. }

I, Jerome J. Duff, counsel for the Petitioners herein, and attorney of record for the Petitioners in the Courts below, depose that on the 6 day of January, 1967, I served four copies of the foregoing Petition for Writ of Certiorari on the Respondent, as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Messrs. Bartlett, Stix and Bartlett and Bartley, Siegel and Bartley, Attorneys of Record for the Respondents, in care of their offices, 408 Pine Street, St. Louis, Missouri 63101, and 130 South Bemiston, Clayton, Missouri 63105, respectively.

Jerome J. Duff,
Member of the Bar of the
United States Supreme Court.

APPENDIX.

APPENDIX A.

Opinion of the
United States Court of Appeals
For the Eighth Circuit.

No. 18,083

John Woody, et al., Appellants,

v.

Sterling Aluminum Products, Incorporated, a Missouri Corporation; International Association of Machinists; District No. 9, International Association of Machinists; Local Lodge 41 of the International Association of Machinists; Larry Connors, Individually, Directing Business Representative, District No. 9, I. A. of M., Offices; Russell Davis, Individually, Business Representative, District No. 9, I. A. of M. Offices, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[September 2, 1966.]

Before VAN OOSTERHOUT and MEHAFFY, Circuit Judges, and VAN PELT, District Judge.

MEHAFFY, Circuit Judge.

Plaintiffs, one hundred ninety-three former machinist employees of Sterling Aluminum Products, Incorporated

(Sterling), at Sterling's St. Charles, Missouri plant, have appealed from a judgment of the United States District Court for the Eastern District of Missouri dismissing their complaint against Sterling, plaintiffs' local bargaining unit (Union), the international and individual union representatives.[1] Plaintiffs sought millions of dollars in damages for breaches by Sterling of a collective bargaining agreement, alleged to have been collusively negotiated by Sterling and plaintiffs' exclusive bargaining agent, District No. 9. Some two years after the St. Charles plant was closed, plaintiffs by amendment sought enforcement of the grievance procedure contained in the collective bargaining agreement.

There are two published opinions of the District Court. In the first opinion, dealing with the original and first amended complaint, the District Court entered summary judgment for Sterling on Count III and dismissed the other three counts upon motion.[2] 244 F.Supp. 84 (E.D. Mo. 1965). Thereafter, however, by nunc pro tunc order entered January 26, 1965 plaintiffs were granted the right to file what is hereafter referred to as the second amended complaint.

This second amended complaint contained six counts and resulted in a decision adverse to plaintiffs on all counts. 243 F.Supp. 755 (E.D. Mo. 1965). Both opinions deal exhaustively with the facts and legal issues, so we summarize as briefly as possible in a case made complex and annoyingly difficult because of the garbled overlapping and contradictory allegations of the pleadings.

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[1] The Unions made parties defendant were the International Association of Machinists; District No. 9, International Association of Machinists of which plaintiffs were members; and Local Lodge No. 41 of the International Association of Machinists. Individual parties defendant were Larry Connors and Russell Davis, business representatives of District No. 9.

[2] The complaint was almost immediately replaced with the first amended complaint.

In 1961, in settlement of a five-month strike at Sterling's St. Charles plant, the Union and Sterling negotiated a two-year contract to terminate February 28, 1963. A major issue involved severance pay and a chief topic of discussion was the possibility that Sterling might move its production from St. Charles, Missouri. Initially, Sterling adamantly refused to consider any such provision because it had been concluded due to many factors that the St. Charles operation could no longer be profitably maintained. However, the negotiated contract contained an express provision recognizing Sterling's right to permanently close the St. Charles plant at any time during the contract term or to permanently discontinue all or part of any department and terminate the involved employees.[3]

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[3] "(j) The Union recognizes the right of the Company in its sole discretion at any time during the term of this agreement, to close down permanently its plant at St. Charles or to discontinue permanently a department of the plant or a substantial portion thereof and terminate the employment of individuals. The employee whose employment is terminated either directly or indirectly as a result thereof because he was not entitled to other employment with the Company under the provisions of Article IV, Seniority, shall be entitled to a seniority termination allowance providing such termination for reasons set forth above occurred after March 1, 1961. Such allowances shall be in accordance with the following schedule:

3 to 5 years with the Company, 2 weeks' pay;

5 to 7 years with the Company, 3 weeks' pay;

7 to 10 years with the Company, 4 weeks' pay;

10 years or more with the Company, 5 weeks' pay;

computed at his base rate of pay.

"Temporary layoff for reasons other than those stated in the first paragraph of paragraph (j) during such two-year period shall not constitute termination entitling the employee laid off to such seniority termination pay as set forth above.

"It is expressly understood at the expiration of this two-year contract the Company shall have the right to close down permanently the St. Charles plant, to relocate permanently any department thereof or discontinue permanently any such department, without seniority termination pay."

The contract called for termination allowances for the employees scaled to their length of service but to be effective only if the St. Charles operations were relocated during the life of the contract. Sterling was relieved of its obligation to pay the seniority termination allowance if the plant closure or department phase-out occurred after the expiration of the two-year contract.[4]

On December 26, 1962, Sterling, by mail, notified the Union that the St. Charles plant would be permanently closed on the expiration date of the contract, February 28, 1963. The Union agreed to terminate the agreement and offered proposed amendments to which Sterling reiterated the permanent closing of the plant but expressed a willingness to discuss current contract matters before termination on February 28. The Union was also advised that since it did not represent Sterling employees at other plants and no St. Charles employees would be employed, the negotiation of a new contract would be unnecessary.

On February 27, 1963, employees were officially notified that the plant would be permanently closed at the end of the day, February 28, and that all employees would be terminated at that time. Employees were not to report to work February 28 but would be compensated for that day.

For several months prior to closure of the St. Charles plant, it was common knowledge that operations would be moved to Malden, Missouri and that Sterling had leased production facilities in Malden on November 23, 1962.

During this period, Sterling had indications that illegal efforts would be made to damage the St. Charles property. Defective pistons sent to customers required reimbursement of $20,000 for damages to assembled engines in which the pistons had been installed. An experienced

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[4] See note 3.

production worker produced 2,000 truck pistons with tapered instead of square cut grooves, an obvious malfabrication readily admitted by a Union official. Plaintiff John Woody reported an unusual amount of scrap accumulating which could be corrected if he were elevated to foreman. More important were the threatening telephone calls to Sterling's president creating apprehension of serious damages to the company property which included expensive and sensitive machinery. Thus, the decision to deny plaintiffs access to the plant on the last working day although they would be compensated.

Plaintiffs' original complaint was filed September 13, 1963, some six months after closing of the plant. We are first concerned with the disposition of Count III in the first amended complaint as this was resolved with finality by the District Court's granting Sterling's motion for summary judgment.

Count III of First Amended Complaint.

In Count III, plaintiffs sought damages against Sterling for loss of seniority termination benefits alleged to be due under the provisions of the bargaining agreement. Plaintiffs alleged that termination was effectuated on February 27, 1963, whereas the contract expired on February 28, 1963.

Sterling moved to dismiss for (1) lack of jurisdiction; (2) lack of individual capacity to sue on the matter involved; and (3) failure to state a claim upon which relief could be granted.

Plaintiffs and Sterling filed motions for summary judgment, both being accompanied by affidavits.

Assuming jurisdiction, a simple construction of the contract is involved and we agree with the District Court's interpretation and also its conclusion that undisputed

evidence, supporting the summary motions, reflects that plaintiffs were not terminated until the contract had expired, and hence not entitled to judgment for termination allowances.

A serious question exists, however, as to plaintiffs' right to bring this action because of failure to exhaust their contract grievance procedure remedies. The District Court seriously questioned its jurisdiction but because of the parties' apparent waiver of those remedies proceeded to determine the issue on evidence before it.

The issue before us then is whether plaintiffs may seek federal court aid by an action on a collective bargaining agreement under § 301 (29 U.S.C.A. § 185(a)) without first exhausting the internal contract remedies.

Our duty to formulate a uniform body of substantive federal labor law for the enforcement of collective bargaining agreements has been recognized. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957). But the actual content of § 301 jurisdiction has not been defined and has rather been developed on a case-by-case piecemeal basis. The pre-emption of *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959), depriving both state and federal courts of § 301 jurisdiction to hear individual complaints on contract breaches if the questioned activity is arguably subject to § 7 or § 8 of the National Labor Relations Act has now been explained so that "[t]he authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Smith* v. *Evening News Ass'n.,* 371 U.S. 195, 197 (1962); *Local 714, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 (1962); *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238 (1962).

And though § 301 jurisdiction has been extended to "suits to vindicate individual employee rights arising

from a collective bargaining contract," *Smith* v. *Evening News Ass'n., supra* at 200, there remains the condition precedent "that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965); *Smith* v. *Evening News Ass'n., supra* n. 1 (by implication); *Belk* v. *Allied Aviation Service Co.*, 315 F.2d 513 (1963), cert. denied, 375 U.S. 847 (1963).

In the case at bar, the bargaining agreement contains four steps detailing the internal grievance procedure for exclusive settlement of all differences between the employees individually and collectively and Sterling.[5] But

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[5] "Section 3. Should differences arise between the Company and its employees either individually or collectively as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or if any trouble of any kind arises, an earnest effort shall be made to settle such differences at the earliest possible time by use of the following procedure:

"Step 1. The employee, the shop steward and the foreman shall attempt a satisfactory settlement of the grievance.

"Step 2. If no satisfactory settlement is reached between the employee, shop steward and the foreman, the grievance must be referred in writing to the Department Superintendent who shall attempt to settle the difference between the employee, shop stewards, foreman and chief shop steward.

"Step 3. If any grievance is not settled by the foregoing methods it shall be considered by a committee composed of the Business Representative designated by the Unions, an officer of the Company and the group listed in Step 2. In the event it becomes necessary for the Chief Steward to visit either the department office or the main office on a grievance, the Chief Steward shall be accompanied by the department Steward involved and the aggrieved employee involved.

"Step 4. In the event the Company and the Unions cannot agree upon the disposition of the grievance, any such matter shall be submitted to arbitration by an impartial Arbitrator to be selected by mutual agreement between the Company and the Unions. In the event the Company and the Unions cannot agree on selection of the Arbitrator within five (5) days (the time

there is no allegation in the pleadings or offer of proof that any attempt was made to use this contract grievance procedure. The admitted fact as seen from plaintiff Woody's affidavit is that no grievance was ever processed to the first procedural step. We have no authority to ignore or exceed the contract as it is both the source and extent of the aggrieved employee's rights under § 301. *Republic Steel Corp.* v. *Maddox, supra.*

Neither are plaintiffs saved by the possibility of Union refusal, hostility or "perfunctor[y]" representation for, so far as we can determine from the record, plaintiffs deliberately stripped Count III of any allegation of conspiracy between the Union and Sterling and sought a straight contract action for money damages predicated upon Sterling's decision to close the plant, allegedly executed during the life of the contract, thereby entitling plaintiffs to seniority termination allowance.

We, therefore, conclude that plaintiffs' failure to utilize the contract grievance procedure precludes their right to maintain the Count III action. *Republic Steel Corp.* v. *Maddox, supra.*

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may be extended by mutual agreement) the Arbitrator shall be selected by the Company and the Unions from a panel of five (5) submitted by the Federal Mediation and Conciliation Service. The decision of the Arbitrator shall be final and binding on all parties. The Company and the Unions shall share equally the expense of the Arbitrator and each shall bear its own expense in arbitration. Should the Company refuse to arbitrate any dispute as herein set forth, the Unions shall be free to strike.

"Any agreement or settlement of differences arrived at between the Company and the Unions pursuant to this Section shall be reduced to writing.

"Section 4. The parties agree that as a part of the consideration of this contract any and all disputes and any and all claims, demands or action growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the preceding Section."

Second Amended Complaint.

On January 30, 1965, some two years after the closing of the St. Charles plant and termination of plaintiffs, the second amendment to the complaint was filed. This pleading sought an order restoring plaintiffs to the status quo of their employment at the time Sterling notified the Union of its intention to close the St. Charles plant; an order to pay all back pay and accrued benefits plus interest to the plaintiffs from February 27, 1963 to the date of the court order; an order requiring Sterling to commence bargaining with plaintiffs regarding all pending grievances; an order to bargain with respect to the closing of the plant; an order authorizing the shop steward to act in behalf of plaintiffs; and for any other or additional orders which the court deemed necessary to restore plaintiffs to the status quo of their employment conditions of December 1, 1962; for an order finding that the Union and its officials be jointly liable for back pay and accrued benefits with Sterling; and to further file grievances regarding the decision of Sterling to close its St. Charles plant and terminate plaintiffs. In the alternative, the second amended complaint sought an order requiring both Sterling and the Union to respond in damages to plaintiffs for the full amount of wages and accrued benefits which each plaintiff would have earned under the provisions of the contract to their normal employment retirement date.

The District Court found the second amended complaint violative of Fed. R. Civ. P. 8(a) and (e) in failing to "comply with the fundamental principles of good pleading," and characterized it as "unduly prolix, involved, repetitious and [of a] confusing nature" without separation of "inconsistent allegations." 243 F.Supp. at 759. Had the second amended complaint been dismissed under Rule 8, we would have been inclined to sustain the ruling. *Wallach* v. *City of Pagedale*, 359 F.2d 57 (8th Cir. 1966).

The District Court, however, in the interest of finality proceeded to probe the pleadings for an ascertainment of whether plaintiffs would be entitled to any relief under any statement of facts that might be proved in support of the complaint. Those efforts proving futile, the second amended complaint was dismissed upon defendants' motions. We have likewise canvassed the record in its entirety and agree with the correctness of the District Court decision.

Although the second amended complaint is indeed abstruse and asserts manifold claims framed in six counts,[6] it can be broadly stated that the legal issues involve only the jurisdiction of the federal court as to (a) claims for alleged breach of the bargaining contract and (b) claims for alleged failure of the Unions to represent their members in good faith but unlawfully conspiring and colluding with Sterling to permit the closing of the St. Charles plant and the termination of its employees.[7]

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[6] We are concerned here only with Counts I and V. Count III is identical with Count III of the first amended complaint which the District Court resolved with finality and was only included in the second amended complaint because a motion for new trial was pending and plaintiffs did not want to waive their rights under the court's previous order. Plaintiffs dismissed Count IV and Counts II and VI merely sought punitive damages. Count V in the main is a reallegation of the matters set forth in Count I and this count was directed solely at the Union.

[7] Plaintiffs state their claims with somewhat more specificity in their complaint as follows:

"This Count of Plaintiffs' Complaint is predicated and founded upon an illegal and unlawful conspiracy and series of collusive acts comprising a deliberate, predetermined and illegal plan and scheme contrived and entered into by the Defendant, Sterling, by and through its agents and corporate officers, and the Defendant Labor Organizations and the Labor Organization Officials, Connors and Davis. The purpose of the collusion and conspiracy by and between these Defendants was to allow the Defendant, Sterling, to close down its plant in St. Charles, Missouri, and permanently terminate the employment and union recognition of all of these Plaintiffs and to attempt to eliminate

Preliminarily, we reiterate that the provision allowing Sterling to move its plant and terminate its employees resulted from negotiations during the course of a strike and was in fact the ratio essendi of the bargaining agreement. Neither plaintiffs nor the Union ever sought to process any grievance on account of the plant's closing, employees' termination, or Sterling's refusal of jobs at other plants. The complaint uses language of hostile discrimination and similar verbage in characterizing the Union's activity when in fact there was no discrimination whatsoever as all employees were treated alike. Further, the broad and colorful language suggesting that the Union was inimical to its constituents was not supported by any allegation of bribery, preference or anything else that would be indicative of substance to plaintiffs' broad charges. We do not discuss these matters in more detail

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and avoid any contractual and/or legal liabilities to these Plaintiffs as a result of the permanent loss of their employment and the loss of the recognition of their Union. The collusion and conspiracy between these Defendants consisted generally of a series of acts and conduct which allowed the Defendant, Sterling to breach the terms and provisions of its labor-agreement with the Plaintiffs at will; the refusal of the Defendant, Labor Organizations, by and through the Defendant, Labor Organization Officials, to take any protective and/or remedial actions for and in behalf of the Plaintiffs when the Labor Organization Officials knew of frequent and repeated acts of breach of the labor-agreement by the Defendant, Sterling; the intention of these Defendants to discriminate in a hostile fashion against the employment and labor organizational rights of these Plaintiffs by the concerted refusal of the Defendant, Sterling to process the grievances of the Plaintiffs coupled with the failure and refusal of the Defendants Labor Organizations and Labor Organization Officials to file and/or process grievances in behalf of these Plaintiffs and the repeated misrepresentations by all of these Defendants to the Plaintiffs of the true facts and circumstances of the status of the Plaintiffs' employment coupled with the repeated breach of fiduciary duty and responsibility of representing the Plaintiffs fairly and honestly by the Labor Organization Officials to fully and fairly disclose to Plaintiffs the information and knowledge gathered by the Labor Organization Officials of the existing material and relevant facts and circumstances affecting the terms and conditions of Plaintiffs' employment."

because their lack of substance makes them unimportant in the light of our opinion that all of the charges in the complaint fail to establish jurisdiction of the federal court over the issues here involved.[8]

Accompanying plaintiffs' motion for summary judgment against Sterling was an affidavit of plaintiff John Woody which also identifies and attaches certain documentary exhibits. Woody stated that at all relevant times he was either chief shop steward or shop steward and an employee of Sterling. He further avowed:

> "Affiant further states that each of the Exhibits identified as 'Grievances' and numbered Exhibit 3 (a through h) have been duly filed with the Defendant, Sterling. These Grievances have never been processed beyond the mere act of filing the Grievances. No Grievance was ever taken to step One as provided in Exhibit A (page 8). The processing of the said Grievance in behalf of Machinist Union employees of Defendant, Sterling, is one of the responsibilities of this Affiant as Chief Shop Steward."

Woody's affidavit was also supported by inter-union correspondence reflecting that several grievances had been processed—some settled satisfactorily—others not for lack of facts of a contract breach. Additionally, the correspondence reveals that the Union was unhappy and dis-

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[8] It would unduly prolong this opinion to discuss all plaintiffs' various complaints. Some are specious on their face and subject to dismissal for failure to state a claim upon which relief can be granted. Examples are complaints with respect to matters pre-dating the contract during the time of the strike and when no contract was in existence. Others failed to specify dates and could possibly have been during periods which would not give rise to a cause of action. Additionally, we have heretofore held that the Union alone has the right to negotiate broad policy issues such as re-negotiation of a new contract and relocation of a plant. The individuals have no vested interest in a company's operation being conducted at any certain location and Sterling had no duty to arbitrate this or any other issues that it had not agreed to arbitrate. See *Brown v. Sterling Aluminum Products, Inc.*, ... F. 2d ... (8th Cir. 1966).

turbed at Sterling's move but "in checking from all angles it seemed the company had stayed strictly legal." All of the defendants moved for dismissal of the amended complaint setting up lack of jurisdiction, failure to state claims upon which relief could be granted, as well as for other reasons not pertinent here. Sterling's response revealed that neither plaintiffs nor the Union had attempted a discussion or filed any grievance with Sterling respecting the plant closure, its removal, termination of employees, despite Sterling's reiterating in writing on January 14, 1963 its plan to close, remove and terminate plaintiffs and its expression therein of its willingness to discuss any subject within the scope of the then current labor contract.

Concerning ourselves first with all claims that can be construed to be breach of contract, we only have to look to the Woody affidavit to determine that the evidence before the District Court admittedly sufficed to conclusively show that plaintiffs have never attempted to process any unresolved grievance, even to Step 1 of the grievance procedure. Thus, plaintiffs had no standing in federal court on their alleged claims for breaches of contract which normally might give rise to § 301 jurisdiction. Therefore, *Maddox* is controlling of all alleged breach of contract claims.

Plaintiffs, however, suggest that the District Court has jurisdiction under the doctrine of "pendente lite"; that because the District Court resolved the issue of Count III of the first amended complaint on its merits, the federal court had jurisdiction of other matters and causes of action not otherwise cognizable in federal court. We have concluded that, under *Maddox*, it was unnecessary for the District Court to decide Count III on its merits. In any event, the causes of action now asserted depend on different facts and constitute separate and distinct causes of

action and the rule of pendente lite has no application here.[9]

Our remaining jurisdictional issue concerns those allegations in Count I, charging the Union with conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment, and failing to represent plaintiffs fairly and honestly. The District Court held that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under § 301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board. We think this holding was correct. *San Diego Bldg. Trades Council* v. *Garmon, supra; Local No. 100* v. *Borden*, 373 U.S. 690 (1963); *Local No. 207* v. *Perko*, 373 U.S. 701 (1963). We think it is at least arguable that these allegations, if true, would be an unfair labor practice within the protection of § 7 and prohibition of § 8 of the Act "although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act. . . . ." *Humphrey* v. *Moore*, 375 U.S. 335 (1964). Unlike

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[9] In *Hurn v. Oursler*, 289 U. S. 238, 245 (1933), the Supreme Court stated:

"But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*."

Moore, however, plaintiffs' allegations here are not contract oriented and not, therefore, "within the cognizance of federal and state courts." *Smith* v. *Evening News Ass'n., supra.*

Although *Garmon, Borden* and *Perko* involved complaints based upon a state cause of action and are not controlling in cases involving alleged violations of federal law, they are guidesome in determining the extent of § 301 jurisdiction and "when, for what kinds of breach and under what circumstances, an individual employee can bring a 301 action." *Smith* v. *Evening News Ass'n., supra* at 204 (Mr. Justice Black dissenting).

No precedent has been called to our attention and our research has revealed none that would vest the federal courts with jurisdiction under such circumstances as exist here. Indeed, to rule jurisdiction might well jeopardize the whole concept of collective bargaining as we know it. We are not prepared to pioneer the allowance of so drastic a step and, for this as well as the other reasons hereinbefore expressed, the judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

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Petition for Rehearing.

The appellants respectfully petition this Honorable Court for a rehearing of the appeal in this cause, and in support of this petition represent to the Court as follows:.

Appellants reserve their argued position as to each of the points of appeal. In this petition appellants address themselves solely to those features of this Court's decision wherein they believe that the Court may be convinced that the result herein is based upon an erroneous application of certain relevant facts and controlling matters of law.

Appellants respectfully request the Court to re-consider its decision in reference to the following facts and the law applicable thereto which were overlooked:

Appellants are compelled to ask this Court at the commencement of this petition to re-consider its derogatory comments regarding the Second Amended Complaint (Court's Opinion, pages 3, 9 and 10). This Complaint is an attempt to plead a complicated conspiracy by two contracting parties (the Company and Union). The Union is a fiduciary agent in behalf of its members. The Company dealt at arm's length at all times with the Union and the members-employees. There is obviously a vast difference in the legal relationship of the Company to its employees compared to the legal relationship of the Union to its members. Onto this background of necessary identification of the legal relationship of the parties to each other the draftsman attempted to follow the Mandate of Rule 9 (b), F. R. C. P., requiring the pleading of "circumstances constituting fraud" to be "stated with particularity". Appellants state that the normal pleading requirements of Rule 8 (a) and (e), F. R. C. P., are not applicable when the Complaint is predicated upon fraud. The technical pleading form required by Rule 9 (b),

F. R. C. P., applies. "The standards generally applicable to notice pleading require little specificity for a complaint filed in the federal court, **EXCEPT** (emphasis added) that a claim based on fraud must be supported by specific allegations" (McGuire v. Sadler, 337 F. 2d 902 at 905). Appellants again point out that only one of the defendants (the Company) attacked the Complaint under Rule 8, F. R. C. P. (R. 221). The other defendant (the Union) moved that the same complaint be made more definite in forty areas (R. 211 through 219). Appellants sincerely apologize for the difficulties caused by the complaint; however, we hasten to add that both respondents, the District Court Judge below and this Court have clearly identified (and obliterated) every issue raised by this pleading with stunning accuracy.

In an attempt to maintain both clarity and brevity in this petition, appellants have isolated the findings of the Court into three areas:

I. The claim for severance pay (Count III) (Court's Opinion, pages 5, 6, 7 and 8).

(a). This Court found the plaintiffs failed to utilize the contract grievance procedure and thereby precluded their right to maintain an action for severance pay (Court's Opinion, page 8).

Appellants respectfully point out that they deliberately "shifted gears" to amend the relief which they are seeking in the Count III action for severance pay. The Plaintiffs' Motion for New Trial on Count III clearly set out the plaintiffs' request for an "Order of Arbitration" (R. 118 through 121 and their reasons for requesting arbitration at that critical time, R. 119, sub-paragraph (f)).

Inasmuch as this Court has all of the parties to this dispute before it appellants continue to seek an order of arbitration now that this Court has found the subject matter of the disputes to be of "substantive arbitrabil-

ity". The issues of "procedural arbitrability" recited in the opinion can and must be determined only by the arbitrator. (Wiley v. Livingston, 376 U. S. 543, 84 S. Ct. 909 and Brewery Workers Union v. Adolph Coors Co., 250 F. Supp. 279 (1964).)

Convinced that the issues in the severance pay claims must be so resolved, this Court's duty has been enunciated by the United States Supreme Court in the case of U. S. v. Western Pac. Ry. Co., 352 U. S. 59, 63-64; 77 S. Ct. 161, 164-165. The Supreme Court there held "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies", (or, as in this case, exhaustion of "internal contract grievance procedures", Court's Opinion, page 6) "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties", (or, as in this case, the arbitrator, Court's Opinion, pages 7 and 8, footnote No. 5). "Exhaustion applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (See also U. S. v. R. C. A., 79 S. Ct. 457 at 465, footnote No. 14.)

II. The claim for mandatory bargaining regarding the termination of employment and the plant relocation (Court's Opinion, page 9).

(a) This Court found that "plaintiffs had no standing in federal court on their alleged claims for breaches of contract which normally might give rise

to Section 301 jurisdiction. Therefore, Maddox" (Republic Steel Co. v. Maddox, 85 S. Ct. 614 (1965)) "is controlling of all alleged breach of contract claims" (Court's Opinion, page 13).

Appellants respectfully submit that this finding is coupled with further findings to the effect that "neither plaintiffs nor the Union ever sought to process any grievance on account of the plant's closing, etc." (Court's Opinion, page 11), and that plaintiff, Woody, "never attempted to process any unresolved grievance, even to Step 1 of the grievance procedure" (Court's Opinion, page 13). These findings overlook the following facts:

1. The Union sent "proposed changes in the agreement" to the Company on December 28th, 1962 (R. 91 and 154 through 160).

2. These proposals were sent two days **AFTER** the Company notification of its intention to shut down the St. Charles Plant (R. 89 and 153).

3. These proposals specifically included amendment of the contract on the designation of the "St. Charles" plant (R. 155, No. 1); "The Company will not make changes affecting employees without first reaching an agreement with the Union" (R. 156, No. 7); substantial amendment of the "close down" clause (original contract, R. 45 and 46, sub-paragraph (j); compare-proposals, R. 156 to 158, paragraphs 10 and 11).

4. The Chief Steward, Woody, attempted to get the Union to act (obviously to no avail) on the Grievances (R. 163, Woody letter to Business Representative, Elliot; R. 164, Woody letter to International President, Hayes).

5. The affidavits of the plaintiffs (R. 80 and 148) describing the plaintiffs' willingness to bargain (R. 80, affidavit, Nos. 10 and 11; R. 149 and 150, sub-paragraph (d); R. 150, sub-paragraphs (e) and (f)).

(a) The affidavit on page 80 of the record recites that this is "one of 193 affidavits of a similar nature". The plaintiffs deny (193 times) any knowledge of threatened or intended violence against Sterling Company employees or property. The Company president's affidavit (R. 95 through 100), reciting the rankest hearsay regarding the reasons for closing the plant on February 28, 1966, was apparently accepted as a finding of fact by this Court (Court's Opinion, pages 4 and 5), even though it did not identify any one of the 193 plaintiffs, each of whom denied such conduct under oath.

In view of the Court's ruling that "Maddox (supra) is controlling of all alleged breach of contract claims" the appellants further submit that the findings of substantive and procedural arbitrability are again focused on these issues and we would welcome and urge the order suggested in Paragraph I of this petition referring the three parties and all of the issues herein to the arbitrator.[1]

III. The claim of the breach of the duty of fair representation by the labor organization and its officials (Court's Opinion, pages 14 and 15).

(a) This Court ruled that this claim "was within the exclusive jurisdiction of the N. L. R. B." (Court's Opinion, page 14).

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[1] The Court's opinion on pages 11 and 12 (footnote 8) specifically refers to the case of Brown v. Sterling Aluminum Products, Inc. (Case No. 18,218) which is companion in some respects to this case. This Court refers to a ruling in the Brown case which is also controlling in this case. A petition for rehearing in the Brown case has been filed a few days before this petition and appellants respectfully urge that this Court also consider the Brown case petition for rehearing in those areas where similar rulings were made applicable to this case. Appellants also respectfully urge consideration of this petition and the Brown petition by the Court en banc in accord with Rule 15 (e) of this Court.

Appellants submit that this ruling overlooks and is in direct conflict with the holdings outlined in the following cases:

1. Humphrey v. Moore, 84 S. Ct. 363 at 368 and 369;
2. N. L. R. B. v. Miranda Fuel Co., 326 F. 2d 172 at 180;
3. Belk v. Allied Aviation Service, 315 F. 2d 513 at 517-518;
4. Falsetti v. Local Union, U. M. W., 355 F. 2d 658;
5. Mandel v. Highway Motor Drivers Union and Yale Transport Co., 246 F. Supp. 805;
6. Serra v. Pepsi-Cola Bottlers, Inc., 248 F. Supp. 684;
7. Norman v. Willis, 402 S. W. 2d 46 (Kansas City, Mo. Ct. of App.);
8. Sipes v. Vaca, 397 S. W. 2d 658 (Mo. Sup. Ct., en banc, in a highly illustrative decision), cert. granted, 86 S. Ct. 1863.

For all of the foregoing reasons the appellants respectfully pray that this petition for rehearing be granted.

.....

Jerome J. Duff.

John Woody, et al., Appellants,
vs.
Sterling Aluminum Products, Incorporated, et al.

Appeal from the United States District Court for the Eastern District of Missouri.

There is before the Court appellants' petition for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

October 11, 1966.

Subscribed and sworn to before me at St. Louis, Missouri, this ... day of ....., 1966.

.....

Notary Public.

My Commission Expires .....

Copy of the Motion mailed to Messrs. Bartlett, Stix and Bartlett, Attorneys for Respondent Company, 506 Olive Street, St. Louis, Missouri 63101, and Messrs. Bartley, Siegal and Bartley, Attorneys for Respondent Union, et al., 130 South Bemiston Avenue, Clayton, Missouri 63105, this 3 day of October, 1966.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN WOODY
and
192 ADDITIONAL PETITIONERS,

vs.

STERLING ALUMINUM PRODUCTS, INC.
and
INTERNATIONAL ASSOCIATION OF MACHINISTS
and
DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LOCAL LODGE NO. 41 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LARRY CONNORS, Directing Business Representative, District No. 9, I. A. of M.,
and
RUSSELL DAVIS, Business Representative, District No. 9, I. A. of M.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari, Of Respondents, International Association of Machinists, District No. 9, International Association of Machinists, Local Lodge No. 41 of the International Association of Machinists, Larry Connors, Directing Business Representative, District No. 9, I. A. of M., and Russell Davis, Business Representative, District No. 9, I. A. of M.

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IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN WOODY
and
192 ADDITIONAL PETITIONERS,
vs.
STERLING ALUMINUM PRODUCTS, INC.
and
INTERNATIONAL ASSOCIATION OF MACHINISTS
and
DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LOCAL LODGE NO. 41 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LARRY CONNORS, Directing Business Representative, District No. 9, I. A. of M.,
and
RUSSELL DAVIS, Business Representative, District No. 9, I. A. of M.,
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BRIEF

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JURISDICTION.

Jurisdiction of the Supreme Court is invoked by Petitioners under the Act of June 25, 1948, C. 646 (1), 62 Stat. 928 (1), Title 28, U. S. C. A., § 1254.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is reported at 365 F. 2d 448, and also appears as Appendix A to Petitioners' petition for Writ of Certiorari, pages 9-23. The District Court entered two opinions, the first being reported at 244 F. Supp. 84 (January 21, 1965), and the second at 243 F. Supp. 755 (July 21, 1965).

QUESTIONS PRESENTED.

We submit that the questions presented should not be predicated upon hypothetical assumptions outside the record as Petitioners have presented them. For example, there is nothing in the record to support the statement that the Union has abandoned Petitioners. Accordingly these Respondents submit the following revised questions:

1. May Petitioners, without first attempting use of the internal contract grievance procedure, seek federal court aid to compel their former employer, Respondent Sterling Aluminum Products, Inc., to bargain and/or arbitrate with their Chief Steward and Stewards regarding the termination of their employment and the relocation of the manufacturing plant after the termination of the collective bargaining agreement between their former employer and their collective bargaining representative, Respondent District No. 9, International Association of Machinists?

2. May Petitioners maintain a suit for damages in federal court against their union for an alleged breach of the union's duty of fair representation based, not upon breach of contract, but upon an alleged conspiracy between the employer and their union where the conduct complained of is at least arguably protected by Section 7 of the National Labor Relations Act, 29 U. S. C. A., Section 157, or constitutes unfair labor practices prohibited by Section 8 of the Act, 29 U. S. C. A., Section 158?

STATEMENT OF THE CASE.

Petitioners are former employees of Respondent Sterling Aluminum Products, Inc., sometimes hereinafter referred to as "Sterling". Each Petitioner belonged to and was represented by Respondent, District No. 9, International Association of Machinists, sometimes hereinafter referred to as "the Union", which was certified as the exclusive bargaining agent for Petitioners as employees of Sterling (R. 122-124).

The collective bargaining agreement between Sterling and the Union was executed on May 5, 1961, became effective as of March 1, 1961, and expired February 28, 1963 (R. 63, 128). Under the terms of said contract, Sterling recognized the Union as the exclusive collective bargaining agent for all of its machinist employees (which included Petitioners) in the Company's St. Charles plant (R. 32).

On December 26, 1962, Sterling advised the Union by letter that it had decided to cease permanently all manufacturing in its St. Charles plant at the close of business on February 28, 1963, and that the labor agreement would be terminated at the close of business on February 28, 1963 (R. 89, 90). On the same date the Union gave Sterling written notice of its desire to terminate said labor agreement, and that proposed amendments would follow at a later date (R. 90). Such contract proposals were sent to Sterling by the Union by letter dated December 28, 1962 (R. 91, 92, 155-160). On January 14, 1963, Sterling advised the Union by letter that on February 28, 1963 the St. Charles plant would close down permanently, that the labor agreement would terminate on February 28, 1963, and that since the Union did not represent any of Sterling's employees at any plant other than the St. Charles plant, no negotiation of any new contracts would be under-

taken (R. 92, 93). Sterling did close down its St. Charles plant as of February 28, 1963 (R. 95-100).

On September 13, 1963, Petitioners filed their original complaint against Sterling and Respondent Unions and Union Representatives, in which they sought over Nineteen Million Dollars damages under four separate Counts (R. 1, 13-27). On October 29, 1963, Respondent Unions and Union Representatives filed motions to dismiss, to strike, to quash service of summons and for a more definite statement (R. 2, 3). Similar motions were also filed by Sterling and by Lincoln National Life Insurance Company, which was also then named as a Defendant under Count IV (R. 3). On November 15, 1963, after a hearing on said motions by the Court, Petitioners were directed to file an amended complaint, setting forth a jurisdictional statement, and on November 26 Petitioners filed their first amended complaint (R. 4). Thereafter, all of the Respondents filed motions to strike, to dismiss and for more definite statements. With respect to Petitioners' first amended complaint, said motions were argued, briefed and submitted to the Court after further, additional oral argument (R. 5, 6). In addition, both Petitioners and Sterling filed motions for summary judgment on Count III (R. 6). On January 21, 1965, the District Court entered its order sustaining all Respondents' motions to dismiss Counts I, II and IV, overruled Petitioners' motion for summary judgment on Count III, and sustained Sterling's motion for summary judgment on Count III (R. 101-116). On January 26, 1965, the District Court amended its order of January 21, and granted Petitioners ten (10) days within which to file an amended complaint (R. 117).

In the course of its Memorandum Opinion of January 21, the Court stated, in referring to Counts I and II that:

> "Neither Count in substance alleges a breach of a collective bargaining agreement between a labor

> organization and an employer or between labor organizations in an industry affecting commerce, hence jurisdiction cannot be predicated on 29 U. S. C. A. 185. * * * Both counts fairly may be construed to allege interference with activities protected by 29 U. S. C. A. 157 and conduct prohibited by 29 U. S. C. A. 158. However, jurisdiction over these matters is committed in the first instance to the National Labor Relations Board and not to this Court. * * * Insofar as Plaintiffs alleged a federal question basing their action on a federal right granted under 29 U. S. C. A. 159, they have not alleged facts bringing them within the one class of cases, beginning with and typified by **Syres v. Oil Workers' International Union, Local No. 23, et al.**, 350 U. S. 892, which recognizes the federal right when hostile discrimination is alleged. No discrimination is asserted here, hostile or otherwise."

On January 30, 1965, Plaintiffs filed their second amended complaint (R. 121-148). As filed, that complaint contained six counts. However, on February 17, 1965, Plaintiffs dismissed Count IV without prejudice (R. 110). Count III, which is directed against only Sterling, merely re-adopts the allegations contained in Count III of the first amended complaint, and takes note of the summary judgment entered in favor of the Company and against Plaintiffs on Count III.

Petitioners asserted that the District Court had jurisdiction of their complaint under Sections 151, 152, **157, 158,** 159, 160 and 163 of the National Labor Relations Act; Sections 141-144, 177, 173 (d), 185 and 186 of the Labor Management Relations Act; Sections 401, 402, 411-415, 483 of the Labor Management Reporting and Disclosure Act; **and even under Sections 151-158 of the Railway Labor Act** (R. 122).

It is almost an impossible task to understand or summarize the allegations of Count I, because the facts and conclusions of law alleged, the alternative and inconsistent allegations and theories, the broad, but unspecific claims of jurisdiction are so intermingled as to be completely confusing and almost incomprehensible. Perhaps the best and fairest way to set forth the nature and theory of Count I of the second amended complaint is simply to accept Petitioners' own statement contained in the second amended complaint as to the theory and nature of Count I. At R. 125, Petitioners allege:

> "This Count of Plaintiffs' Complaint is predicated and founded upon an illegal and unlawful conspiracy and series of collusive acts comprising a deliberate, pre-determined and illegal plan and scheme contrived and entered into by the Defendant, Sterling, by and through its agents and corporate officers, and the Defendant Labor Organizations and the Labor Organization Officials, Connors and Davis. The purpose of the collusion and conspiracy by and between these Defendants was to allow the Defendant, Sterling, to close down its plant in St. Charles, Missouri, and permanently terminate the employment and union recognition of all of these Plaintiffs and to attempt to eliminate and avoid any contractual and/or legal liabilities to these Plaintiffs as a result of the permanent loss of their employment and the loss of the recognition of their Union * * *."

Count II of the second amended complaint is merely a re-allegation of the averments of Count I, with the addition of a claim for exemplary damages based upon the alleged wilfulness of the conduct alleged. Count V is substantially the same as Count II of the first amended complaint. It re-alleges the averments of Count I of the second amended complaint as they relate to Respondent Unions and Union Representatives, and asserts that the

conduct complained of constitutes a breach of the obligation of these Respondents to represent Petitioners fairly and without hostile discrimination. Count VI simply involves a demand for punitive damages on account of the alleged wilfulness of the conduct set forth in Count V.

Thereafter, on February 26, 1965, Respondent Unions and Union Representatives filed their motions to dismiss, to strike and for a more definite statement. The motion to dismiss was based on the following grounds:

1. The Court lacks jurisdiction of the subject matter because the action does not arise under the Constitution of the United States or under the laws of the United States.

2. The acts, activities and conduct of these Defendants complained of in Counts I, II, V and VI are subject to the protections or prohibitions of the National Labor Relations Act and are, therefore, subject to the sole and exclusive jurisdiction of the National Labor Relations Board.

3. Counts I, II, V and VI were not brought within the time limited for such actions, and are barred by the Statute of Limitations.

4. Plaintiffs have been guilty of laches and unreasonable delay in bringing this action, and should be estopped from bringing such action.

5. Plaintiffs have failed to allege that they exhausted their contractual remedies before filing this suit.

6. Counts I, II, V and VI fail to state a claim against said Defendants, or any of them, upon which relief can be granted.

7. Plaintiffs have made an election of remedies under which they have elected to affirm the collective bargaining agreement, and sought to obtain a remedy for all

breaches of contract by Defendant Company under Plaintiffs' Motion for Summary Judgment (R. 82, 143), based on said collective bargaining agreement, and should be precluded and estopped from maintaining claims under Counts I, II, V and VI under which they complain of the conduct of Defendants in negotiating and bringing into existence said collective bargaining agreement (R. 204-206).

Sterling also filed a motion to strike for violation of Rule 8, a motion to require Petitioners to make a coherent separation of the asserted jurisdictional grounds, a motion to dismiss and a motion to strike (R. 220-228).

Thereafter, all the motions of the parties were orally argued, briefed and submitted to the Court. On July 1, 1963, the District Court issued its Memorandum Opinion and Order (R. 232-269) in which it was ordered that Plaintiffs' motion for a new trial on Count III be overruled, that Plaintiff's motion for summary judgment against Defendant Sterling be denied, that Defendants' motions to dismiss Plaintiffs' second amended complaint be sustained, and that said second amended complaint and each of the Counts thereof be dismissed, all at Plaintiffs' costs (R. 269).

The District Court in its first Memorandum Opinion discussed the events leading up to the signing of the May 5, 1961, collective bargaining agreement as follows:

> "The 1961-1963 contract was negotiated in settlement of a five-months' strike at the St. Charles plant. One of the major issues of that strike was whether Defendant would agree to any severance pay. A frequent topic in negotiations was the possibility that the Company might move its production out of St. Louis" (R. 109).

The contract, as finally negotiated and executed on May 5, 1961, contained a provision which gave the Company the

right at any time during the term of the contract (which by its terms expired on February 28, 1963) to close its plant at St. Charles, or any portion thereof, and to terminate the employment of individuals. **The agreement provided, further, that any employee whose employment was so terminated was entitled to a seniority termination allowance to be computed in accordance with a prescribed formula.** It also was provided that temporary layoffs during the contract term would not constitute termination entitling the employee laid off to such seniority termination pay. The contract further provided that "It was expressly understood at the expiration of this two-year contract the Company shall have the right to close down permanently the St. Charles plant, to relocate permanently any department thereof or discontinue permanently any such department, without seniority termination pay" (Subpar. j, Section 1, Article IV, Seniority, R. 45, 46).

Petitioners' claim for seniority termination pay as set forth in Count III of the first and second amended complaints was predicated on the aforementioned subparagraph (j).

In overruling Petitioners' second motion for a summary judgment, the District Court pointed out that the complaint alleges that District No. 9 was certified as the exclusive bargaining agent in behalf of Plaintiffs "in accord with the provisions of the National Labor Relations Act of the United States," and holds that under the statute the "bargaining" must be "collective," through "representatives," and, therefore, Plaintiffs as individuals may not compel Sterling to "bargain" with them (R. 249). The District Court pointed out that the parties to the contract (Sterling and the Union) actually "bargained" with respect to the right of Sterling to close its St. Charles plant and re-locate its facilities. "The results of that bargaining were the express contractual provisions recog-

nizing the right of Sterling 'to close down permanently the St. Charles plant, to re-locate permanently any department thereof or to discontinue permanently any such department' " and, we might add, provision for the payment of seniority termination pay. The Court further stated that "although Plaintiffs complained that these and other provisions of the agreement (e. g., the limited recognition clause) were bargained for in bad faith, they nevertheless concede that the contract as negotiated is binding upon them and seek Section 301 relief on that theory. They are, therefore, in any event, in no position to insist upon renewed bargaining as individuals over issues that were resolved two years earlier, when the instant contract was negotiated and the strike settled" (R. 249).

The District Court further held that even if there was a legal basis for an individual employee or former employee to obtain specific performance of the preliminary grievance procedure prescribed by the contract here in question, under the undisputed facts, Plaintiffs, having failed to comply with the first two steps of the grievance procedure, having delayed some eighteen (18) months before requesting the Court to order Defendant Company to bargain with it on said grievances, and having permitted a fundamental and long-lasting change in the relationship of the parties to take place prior to the demand for arbitration, are now precluded as a matter of law from obtaining such an order (R. 250-259).

The District Court next considered Plaintiffs' claim for relief based on the alleged collusion and conspiracy, as set forth in Count I. The Court found that stripped to its essentials, the conspiracy claim is premised on alleged bad faith bargaining between Sterling, on the one hand, and representatives of the Union, on the other. The Court found that Plaintiffs, having noted the Court's observation in its first Memorandum Opinion of January 21, 1965, that

no discrimination, hostile or otherwise, was asserted as a basis for their claim, "have now interpolated into the allegations of the conspiracy charge vague conclusions of allegedly 'hostile discrimination,' this phrase evidently being used by Plaintiffs simply as words of color to characterize the allegedly collusive actions of the Unions." The Court declared, however, that "the pleaded facts demonstrate there was no discrimination at all" (R. 259). The District Court went on to find that under the allegations of the second amended complaint, all the employees represented by District No. 9 were treated alike, and without discrimination, hostile or otherwise (R. 262).

The Court held that, as it construed the allegations of the second amended complaint, Plaintiffs charge in substance that both the Employer and the Unions failed and refused to bargain collectively and to confer in good faith in respect to wages, hours and other conditions of employment, and thereby interfered with the employees of Sterling in the exercise of rights guaranteed to them by Section 157, 29 U. S. C. A. The District Court held that the activities of which Plaintiffs complain are at least arguably protected by Section 7 of the National Labor Relations Act, 29 U. S. C. A., Section 157, or constitute unfair labor practices prohibited by Section 8 of the Act, 29 U. S. C. A., Section 158, and therefore are subject to the exclusive, primary jurisdiction of the National Labor Relations Board. Acordingly, the Court held that it did not have jurisdiction to determine the merits of the claim (R. 262, 263).

The Court next considered the claims for relief with respect to the alleged breaches of contract. With respect to the claim for failure to pay seniority termination allowances, the Court held that it had Section 301 jurisdiction, and had granted Defendant Company a summary judgment on Count III in its Memorandum Opinion of January, 1963.

The District Court held with respect to Plaintiff's claim for vacation allowances, that it was premised on the theory of a temporary lay-off on February 27, 1963, as distinguished from a termination of employment at the close of the business day of February 28, 1963, and that the facts which sustain the Court's grant of a summary judgment on the seniority termination claim are equally applicable to the claim for vacation allowances, inasmuch as Plaintiffs were not temporarily laid off, nor was their employment terminated during the term of the collective bargaining agreement. The Court held that the disposition of the seniority termination claim necessarily impels dismisal of the factually related vacation allowance claim.

The District Court sustained Defendants' motions to dismiss Count I. The District Court held that its disposition of Count I necessarily results in a dismissal of Count II, which merely sought exemplary damages based upon the alleged wilfulness of the conduct alleged in Count I (R. 268).

The District Court found that Count V is substantially the same as Count II of the first amended complaint, and merely re-alleges the averments of Count I of the second amended complaint as they relate to Defendant Unions and Union Representatives, and asserts that the conduct complained of constitutes a breach of the obligation of these Defendants to represent Plaintiffs fairly and without hostile discrimination. The Court declared that as it had held in Count I, the activities complained of are arguably and potentially unfair labor practices over which the National Labor Relations Board has exclusive, primary jurisdiction. Since Count VI simply involves a demand for punitive damages on account of the alleged wilfulness of the conduct set forth in Count V, the Court's ruling on Count V is also dispositive of Count VI. The Court, accordingly, sustained Defendants' motions to dismiss Counts I, II, V and VI (R. 268, 269).

The Court of Appeals affirmed the judgment of the District Court. With respect to Petitioners' claim for breach of contract against Sterling under Count III of its Second Amended Complaint, the Eighth Circuit held that, while it agreed with the District Court that Petitioners were not entitled to judgment for termination allowances, Petitioners' failure to utilize the contract grievance procedure precludes their right to maintain the Count III action under the holding of this Court in **Republic Steel Corp. v. Maddox**, 379 U. S. 650 (1965).

With respect to Petitioners' claims of unfair representation againt Respondent Unions and Union Representatives based on an alleged conspiracy and collusion between Sterling and the Union, the Court of Appeals agreed with the District Court's holding that the claims of unfair representation against the Union and Union Representatives were not predicated upon the collective bargaining agreement so as to give the Court jurisdiction under Section 301, but were within the exclusive jurisdiction of the National Labor Relations Board. The Court of Appeals then held (at pages 22, 23, Appendix A, Petition for Writ of Cert.):

> "* * * We think it is at least arguable that these allegations, if true, would be an unfair labor practice within the protection of § 7 and prohibition of § 8 of the Act 'although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act . . .' **Humphrey v. Moore**, 375 U. S. 335 (1964). Unlike **Moore**, however, plaintiffs' allegations here are not contract oriented and not, therefore, 'within the cognizance of federal and state courts'."

ARGUMENT.

I.

May Petitioners without first attempting use of the internal contract grievance procedure, seek federal court aid to compel their former employer, Respondent Sterling Aluminum Products, Inc., to bargain and/or arbitrate with their Chief Steward and Stewards regarding the termination of their employment and the relocation of the manufacturing plant after the termination of the collective bargaining agreement between their former employer and their collective bargaining representative, District No. 9, International Association of Machinists?

This Court held in **Republic Steel Corp. v. Maddox** (1965), 379 U. S. 650, 85 S. Ct. 614, 58 LRRM 2193, that "individual employees wishing to assert contract grievances must **attempt** use of the contract grievance procedure agreed upon by employer and union as the mode of redress," before they may invoke the jurisdiction of the courts to remedy such grievances. In the case at bar the bargaining agreement contains four steps detailing the internal grievance procedure for exclusive settlement of all differences between the employees individually and collectively and Respondent Sterling (pages 15, 16, Appendix A, Petition for Writ of Cert.). The Court of Appeals found that there was no allegation in the pleadings or offer of proof that any attempt was made to use this contract grievance procedure and stated:

> "The admitted fact as seen from plaintiff Woody's affidavit is that no grievance was ever processed to the first procedural step. We have no authority to ignore or exceed the contract as it is both the source and extent of the aggrieved employee's rights under § 301."

Accordingly, Petitioners' failure to utilize the contract grievance procedure precludes them from invoking the jurisdiction of the courts to compel Respondent Sterling to bargain and/or arbitrate with them concerning the termination of their employment and the relocation of the company's plant.

Moreover, Petitioners have no standing to compel Respondent Sterling to bargain and/or arbitrate as prayed. It is generally held that individual employees may not by-pass their union representative and compel their employer to arbitrate with them directly. **Black-Clawson Co., Inc. v. International Ass'n of Mach.**, 2 Cir., 313 F. 2d 179 (1962); **Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co.**, 2 Cir., 312 F. 2d 181 (1962); **Local Union No. 12405, Dist. 50 UMW v. Martin Marietta Corp.**, 7 Cir., 328 F. 2d 945 (1964); **Ostrofsky v. United Steelworkers**, D. Md. 1959, 171 F. Supp. 782, aff'd 4th Cir., 1960, 273 F. 2d 614, cert. denied, 1960, 363 U. S. 849, 80 S. Ct. 1244.

In the case of **Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.**, supra, the Court stated at l. c. 184:

> "Moreover, the right to arbitrate is in no sense an incident or a 'condition' of the employer-employee relationship as such, but depends in exactly the same degree as does the union's right to arbitrate on the existence of an agreement to arbitrate. In the absence of such an agreement no employee has the right to compel his employer to arbitrate any matter whatsoever. * * * The attempt to argue for a transfer of the right to arbitrate from union to employees upon the expiration of the collective bargaining agreement finds no support whatever in authority or logic."

With regard to Petitioners' alternate request for a bargaining order against Respondent Sterling, clearly, an employer is obligated to bargain only with the duly recog-

nized or certified representative of its employees." **May Department Stores Co. v. Labor Board,** 326 U. S. 376, 383-384. Petitioners admit in their pleadings that Respondent District No. 9, International Association of Machinists is their certified exclusive bargaining agent (R. 124). The U. S. District found "that the 'indisputable' facts of record, evidenced by the collective agreement, demonstrate that the parties to the contract (Sterling and the Union) actually 'bargained' with respect to the right of Sterling to close its St. Charles plant and relocate its facilities. The results of that bargaining were the express contractual provisions recognizing the right of Sterling to close down permanently the St. Charles plant, to relocate permanently any department thereof or to discontinue permanently any such department" (Fn. 3, R. 249).

Accordingly, we submit in light of the above and foregoing facts and authorities that Petitioners clearly are not entitled to an order requiring Respondent Sterling to bargain and/or arbitrate with their Chief Steward and Stewards regarding the termination of their employment and the relocation of the company's manufacturing plant.

II.

May Petitioners maintain a suit for damages in federal court against their union for an alleged breach of the union's duty of fair representation based, not upon breach of contract, but upon an alleged conspiracy between the employer and their union where the conduct complained of is at least arguably protected by Section 7 of the National Labor Relations Act, 29 U. S. C. A., Section 157, or constitutes unfair labor practices prohibited by Section 8 of the Act, 29 U. S. C. A., Section 158?

The Court of Appeals, in attempting to summarize Petitioners' complaint and the legal issues, stated that the case was "made complex and annoyingly difficult because of the garbled, overlapping and contradictory allegations of the pleadings," and declared that if the Dis-

trict Court, having found the second amended complaint violative of Fed. R. Civ. P. 8 (a) and (e), had dismissed it under Rule 8, the Court of Appeals would have been inclined to sustain the ruling (Appendix A, pages 10, 17, Petition for Writ of Cert.).

Petitioners' claims against Respondent labor organizations and representatives are so confused and conflicting as to almost defy clear statement or rational analysis. Apparently, Petitioners charge Respondent labor organizations and representatives with unfair representation in the negotiation of the collective bargaining agreement with Respondent Sterling executed on May 5, 1961, and effective as of March 1, 1961.

Petitioners state on page 3 of their Petition for a Writ of Certiorari that:

> "The disputes and this litigation arose because of a claim by the employees that their Union had conspired with the company to include certain clauses in the labor agreement which purportedly gave the Company the right to relocate the St. Charles, Missouri, plant and terminate the employment of the machinist employees (R. 128 to 131, sub-paragraphs (e), (f) and (g))."

And at page 5 of their Petition, Petitioners state that: "The claims against this respondent Union and its officers are 'private wrongs . . . as a result of tortious conduct' (Miranda, 326 F. 2d 172 at 180)." Petitioners in their Brief to the Court of Appeals repeatedly characterized their claims against Respondent Unions and representatives as tort claims.

In addition, Petitioners have requested separate and different treatment for the claims for breaches of contract against Respondent Sterling. Petitioners requested the courts below to grant them summary judgment against Sterling on said breach of contract claims. In paragraph

5 of Plaintiffs' Motion for Order of Summary Judgment against Respondent Sterling, Petitioners stated (R. 145):

> "Plaintiffs state that the requested Order of this Court will not conflict, in any way, with the remaining allegations of the Plaintiffs' Second Amended Complaint in regard to the collusion, conspiracy, etc., of the Defendant Sterling, and the breach of duty of the Defendant Unions, for the reason that the alleged disputes arising out of the labor agreement must be resolved before the allegations of conspiracy, collusion, breach of duty, etc., set out in the Plaintiffs' Second Amended Complaint should be properly considered by the Court in the ultimate trial of this litigation."

In addition to the above, Petitioners refer to certain unresolved grievances at page 4 of their Petition for Writ of Certiorari. We are unable to determine from the Petition whether Petitioners are here claiming that Respondent Unions and representatives have unfairly refused to process such grievances. In any event, the Court of Appeals found that in this case, unlike the situation presented in **Humphrey v. Moore**, 375 U. S. 335, 11 L. Ed. 2d 370, 55 LRRM 2031 (1964), that Petitioners' allegations here are not predicated upon a breach of the collective bargaining agreement (Appendix A, pages 22, 23, Petition for Writ of Cert.).

Petitioners' charges of unfair representation against Respondent unions and representatives are within the exclusive primary jurisdiction of the National Labor Relations Board. **San Diego Bldg. Trades Council v. Garmon**, 1959, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775. Since 1962 the Labor Board has consistently taken the position that violations of the duty of fair representation by unions are within its jurisdiction to remedy. **Miranda Fuel Co.**, 140 NLRB 181 (1962), enf. den. 326 F. 2d 172 (2d Cir. 1963); **Independent Metal Workers' Union**

(Hughes Tool Co.), 147 NLRB 1573 (1964); **United Auto Workers**, 149 NLRB 42 (1964); **Cargo Handlers, Inc.**, 159 NLRB No. 17 (1966).

In **Local 12 Rubber Workers v. NLRB**, 150 NLRB 312 (1964), enforced 63 LRRM 2395 (5th Cir., 1966), the U. S. Court of Appeals for the Fifth Circuit, approved the NLRB's position that a union's violation of its duty of fair representation constitutes an unfair labor practice under the Act. Regarding the proper remedial forum for a claimed violation of the duty of fair representation, the Fifth Circuit held that such claims are within the primary jurisdiction of the Labor Board, subject to the single exception that if the claim is based essentially on breach of contract, the courts will have concurrent jurisdiction with the Board albeit the claim also constitutes a violation of the Act. **Humphrey v. Moore**, supra; **Smith v. Evening News Association**, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962). Violations of this hybrid nature may be submitted either to the Board as unfair labor practices, or to the courts as breaches of contract. The Court of Appeals went on to comment that:

> "The critical area requiring jurisdictional readjustment will involve those controversies, * * * where the aggrieved employee's claim is not founded on a breach of the collective bargaining contract, but rather is based squarely upon an alleged violation of the union's duty of fair representation. In this situation, the unfair labor practice jurisdiction of the Board will apparently be exclusive, totally preempting that of the courts" (footnotes omitted).

See also **NLRB v. Local 1367, International Longshoreman's Ass'n**, 63 LRRM 2559 (5th Cir., 1966).

The only other Court of Appeals which has passed on the Board's jurisdiction over charges of unfair representation was unable to arrive at a majority decision. Since only Judge Medina was of the opinion that the Board

does not have such jurisdiction this decision is not in conflict with that of the Fifth Circuit. **NLRB v. Miranda Fuel Co.**, supra.

Recent Supreme Court cases have left open the question whether a breach of the duty of fair representation constitutes an unfair labor practice (**Republic Steel Corp. v. Maddox**, 1965, 379 U. S. 650, 652, 85 S. Ct. 614, 616, 13 L. Ed. 2d 580; **Humphrey v. Moore**, 1964, 375 U. S. 335, 344, 84 S. Ct. 363, 369, 11 L. Ed. 2d 370; **Local 100, United Ass'n of Journeymen v. Borden**, 1963, 373 U. S. 690, 696 n. 7, 83 S. Ct. 1423, 1427, n. 7, 10 L. Ed. 2d 638). But so long as the Board continues to adhere to its position, its exclusive jurisdiction must be respected. Moreover, the issue of whether the violation of the duty of fair representation is or is not an unfair labor practice is not presented in the instant case. That question can only be presented in a case which is decided by the Board in the first instance, and is then presented to this Court on review of the Board's decision. Here the only question presented is whether a violation of the duty of fair representation is "arguably" an unfair labor practice, and the Board's decisions on the subject obviously show that it is.

Recognizing the foregoing as the real issue presented in the case at bar the Court of Appeals found that it is at least arguable that Petitioners' allegations, if true, would constitute unfair labor practices within the protection of Section 7 and prohibition of Section 8 of the Act, and, therefore, ruled that Petitioners' allegations are not "within the cognizance of federal and state courts" (Appendix A, pages 22, 23; Petition for Writ of Cert.).

Thus, Petitioners are precluded from maintaining any action in state or federal courts based on unfair representation by reason of the aforementioned preemption doctrine. Even were we to assume, *arguendo*, that such

doctrine were not applicable here, these Respondents' motion to dismiss Petitioners' second amended complaint (R. 204-206) merits sustention on the other grounds set forth therein.

With respect to Petitioners' claims of unfair representation based on an alleged conspiracy between the union and Sterling while no labor agreement was in effect to include certain clauses in the labor agreement which gave the company the right to relocate the St. Charles, Missouri plant and terminate the employment of the machinist employees, the Court of Appeals pointed out that such claims lacked substance. The Court of Appeals found that:

> "In 1961, in settlement of a five month strike at Sterling's St. Charles plant, the Union and Sterling negotiated a two-year contract to terminate February 28, 1963. A major issue involved severance pay and a chief topic of discussion was the possibility that Sterling might move its production from St. Charles, Missouri. Initially, Sterling adamantly refused to consider any such provision because it had been concluded due to many factors that the St. Charles operation could no longer be profitably maintained. However, the negotiated contract contained an express provision recognizing Sterling's right to permanently close the St. Charles plant at any time during the contract term or to permanently discontinue all or part of any department and terminate the involved employees (Appendix A, page 11, Petition for Writ of Cert.).
>
> "The contract called for termination allowances for the employees scaled to their length of service but to be effective only if the St. Charles operations were relocated during the life of the contract. Sterling was relieved of its obligation to pay the seniority termination allowance if the plant closure or department phase-out occurred after the expiration

of the two year contract (Appendix A, page 12, Petition for Writ of Cert.).

* * *

"Preliminarily, we reiterate that the provision allowing Sterling to move its plant and terminate its employees resulted from negotiations during the course of a strike and was in fact the *ratio essendi* of the bargaining agreement. * * * The complaint uses language of hostile discrimination and similar verbiage in characterizing the Union's activity when in fact there was no discrimination whatsoever as all employees were treated alike. Further, the broad and colorful language suggesting that the Union was inimical to its constituents was not supported by any allegation of bribery, preference or anything else that would be indicative of substance to plaintiffs' broad charges" (Appendix A, page 19, Petition for Writ of Cert.).

With respect to Petitioners' claims of unfair representation based on the Union's alleged failure to process grievances in behalf of Petitioners against Sterling the case of **Republic Steel Corp. v. Maddox**, supra, precludes Petitioners from maintaining an action thereon in federal or state court where, as here, Petitioners admittedly have failed to attempt use of the contract grievance procedure. The affidavit of Petitioner John Moody, filed by Petitioners in U. S. District Court on February 9, 1965 (R. 148-151), states that at all relevant times he was either chief shop steward or shop steward and an employee of Sterling, and then goes on to declare:

"Affiant further states that each of the Exhibits identified as 'Grievances' and numbered Exhibit 3 (a through h) have been duly filed with the Defendant Sterling. **These Grievances have never been processed beyond the mere act of filing the Grievances.** No Grievance was ever taken to step One as provided in Exhibit A (page 8). **The processing of the said Griev-**

ance in behalf of Machinist Union employees of Defendant Sterling is one of the responsibilities of this affiant as Chief Shop Steward.'' (Emphasis supplied.)

It is crystal clear from the foregoing that Petitioners have made no effort to comply with the contract grievance procedure. Petitioners stated on page 20 of their brief to the Court of Appeals that **the Grievance Procedure was specifically designed ''to keep Union Business Representatives OUT of Grievance Procedures until the Company and the employees (working through Stewards) had exhausted the first two steps of the Procedure.''** Thus, the processing of the grievances about which Petitioners complain never reached the third step at which point the Union Business Representative first enters into the grievance procedure. Respondent Union's and union Business Representative's responsibility under the grievance procedure not having arisen, they cannot be charged with having failed to perform duties of representation, much less to have performed those duties unfairly. The Court of Appeals found that the evidence before the District Court conclusively showed that Petitioners have never attempted to process any unresolved grievance even to Step 1 of the grievance procedure. The Court of Appeals thus held that Petitioners had no standing in federal court for any alleged claims for breaches of contract under the controlling doctrine announced in **Republic Steel Corp. v. Maddox** (Appendix A, page 21, Petition for Writ of Cert.).

CONCLUSION.

In light of the foregoing facts and authorities Respondent Unions and Business Representatives submit that the District Court's Orders of January 21, 1965 and July 1, 1965, and the Eighth Circuit Court of Appeal's Order of September 2, 1966, affirming the judgment of the District Court sustaining these Respondents' Motions to Dismiss Petitioners' Second Amended Complaint were all correct

and proper. Petitioners did not allege a breach of the collective bargaining agreement as against Respondent Unions and Union representatives, and, therefore, the District Court did not have jurisdiction over these Respondents under Section 301, nor under any other laws of the United States or the Constitution of the United States. The claims of unfair representation leveled against these Respondents sound in tort rather than in contract, and are, at least, arguably protected by Section 7 or unfair labor practices prohibited by Section 8 of the Act. They are, therefore, subject to the exclusive, primary jurisdiction of the National Labor Relations Board.

In any event, it is indisputable on the record that Petitioners failed to attempt to make use of the contract grievance procedure, and are, therefore, precluded from filing and maintaining suit for any claim subject to the grievance procedure. It is, furthermore, clear under the law and the instant collective bargaining agreement, that Petitioners have no standing or right to obtain a court order requiring Respondent Sterling to bargain and/or arbitrate with their Chief Steward and Stewards.

These Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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State of Missouri, }
County of St. Louis. } ss.

I, Donald S. Siegel, counsel for Respondent Unions and Business Representatives herein, and one of their attorneys of record in the Court below, being duly sworn deposes and say that on February 2, 1967, I duly served four copies of the foregoing Brief in Opposition, as required by the Rules of the Supreme Court of the United States, by mailing such copies to

(a) Jerome J. Duff, counsel and attorney of record for the Petitioners, in care of his office, Suite 1155, 818 Olive Street, St. Louis, Missouri 63101, and

(b) Daniel Bartlett and William Stix of Bartlett, Stix and Bartlett, attorneys of record for Respondent Sterling Aluminum Products, Inc., in care of their office, Suite 405, 408 Pine Street, St. Louis, Missouri 63102, respectively.

Donald S. Siegel,
Member of the Bar of the United
States Supreme Court.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 946.

JOHN WOODY et al.,
Petitioners,

vs.

STERLING ALUMINUM PRODUCTS, INC., etc., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT
Sterling Aluminum Products, Inc.,
IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals for the Eighth Circuit in the case below is reported at 365 F. 2d 448, and also appears as Appendix A to Petitioners' Brief, pages 9-23.

The Opinion supporting the final judgment of the District Court in the case below is reported at 243 F. Supp. 755 (July 21, 1965)—R. 232, reprinted as an Appendix to this Brief. An earlier opinion by the District Court, supporting a dismissal of Count III on the merits and

of the other Counts with leave to amend (R. 117), was filed on January 21, 1965; it is printed in 244 (sic) F. Supp. 84, and appears at R. 100 ff.

JURISDICTION.

The Petitioners invoke the original jurisdiction of the United States District Court conferred by the Labor Managment Relations Act, § 301, Title 29, U. S. C. A., § 185; and the jurisdiction of the Supreme Court is invoked under the Act of June 25, 1948, c. 646 (1), 62 Stat. 928 (1), Title 28, U. S. C. A., § 1254.

QUESTIONS PRESENTED.

Did the Courts below err in holding that a group of employees (even though comprising all the members of a unit represented by a labor organization) have no right to bring and maintain an original suit *ex contractu* under § 301 (Title 29, U. S. C. A., § 185) to compel their employer, "to bargain and/or arbitrate" with them "as individuals" (R. 144) and without participation of their Union (Petition, p. 5), over an alleged "grievance" concerning the employer's announced intention that upon expiration of the contract it would close its St. Charles plant, terminate all employees at St. Charles, and relocate its operation elsewhere, where (a) the contract **expressly** provided that the employer could, upon such expiration, close, remove, and terminate without liability to such employees, (b) neither the employees nor the Union ever filed a grievance over such intention or action of the employer, (c) the plaintiffs, by delay and by bringing this suit, and the employer and the Union by moving to dismiss Count III on the merits, **waived** and **repudiated** arbitration thereon; and (d) the employees claim that the Union "abandoned" them, but make no showing of wrongdoing on the part of the employer?

STATEMENT OF THE CASE.

Out of the complex statements of "details, conclusions, and inconsistent averments" (District Judge Regan's Opinion, R. 238) of the original and various amended complaints filed in this case,[1] it appears that the Petitioners have selected (a) the claim that the individual former employees in the Machinists' Unit of the Respondent's St. Charles plant were "abandoned by their Union," and thereby became entitled, *as individuals,* in an original suit brought under § 301, to seek a Court order compelling the Respondent-employer "to bargain and/or arbitrate" directly with such employees, "by and through their duly elected chief steward and stewards," and not their Union, a claimed dispute over the Respondent's closing and removal of its St. Charles plant and the termination of the Petitioners' employment, all occurring *after* the expiration of the contract between the Union and the Respondent; and, (b) the claim that the United States Courts generally and the Supreme Court in particular should designate "a remedial forum" for the prosecution of "**a claim for damages against a Union** by its members for a breach of the Union's duty of fair representation" (Emphasis supplied).

With this substantial narrowing of the claims confusingly stated even in Petitioners' second amended complaint (R. 121), we shall undertake to state the case relevant thereto, although their broad charge of "abandonment" by the Union does not indicate just what rights of the Petitioners were abandoned by the Union

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[1] See other comments of the District Judge, R. 232-233, 238-239 (243 F. Supp. pages 759, 760, 761, 762) and comments of the Court of Appeals describing the case as one "made complex and annoyingly difficult because of the garbled and overlapping and contradictory allegations of the pleadings (365 F. 2d 448, 454).

and what would be the nature and basis of the claim they would make in the "remedial forum" they seek.[2]

Petitioners are former employees of the Respondent in the machinists' department of its St. Charles, Missouri plant. Each belonged to and was represented by District 9, International Association of Machinists (the "Union"), which was exclusive bargaining agent (R. 122-3). The Union (and its International) are respondents along with Sterling.

THE CONTRACT.

The labor agreement executed by the Union and Respondent (Sterling) in 1961 expired on February 28, 1963 (R. 128).

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[2] From Petitioners' Statement of Questions Presented, we conclude, correctly we trust, that Petitioners now claim, so far as the **employer** is concerned, as a basis for the "abandonment" charge, only the non-action by the Union with respect to the handling of the "grievance" over the closing and removal of the plant and the termination of the employees, and no longer make the numerous other claims made below, e. g. that the employer and the Union colluded in drawing up and executing the contract in 1961, and "grievances" that arose during the term of the contract. Of these other claims, the Court of Appeals said (365 F. 2d 448 at 455, footnote 8; Petition, p. 20):

> "It would unduly prolong this opinion to discuss all plaintiffs' various complaints. Some are specious on their face and subject to dismissal for failure to state a claim upon which relief can be granted. Examples are complaints with respect to matters predating the contract during the time of the strike and when no contract was in existence. Others failed to specify dates and could possibly have been during periods which would not give rise to a cause of action. Additionally, we have heretofore held that the Union alone has the right to negotiate broad policy issues such as re-negotiation of a new contract and relocating of a plant. The individuals have no vested interest in a company's operations being conducted at any certain location and Sterling had no duty to arbitrate this or any other issues that it had not agreed to arbitrate. See **Brown v. Sterling Aluminum Products, Inc.**, 365 F. 2d 651 (8th Cir. 1966)."

The contract in this case provided for recognition of the Union as the exclusive bargaining agent "for all employees in the Company's (Sterling's) **St. Charles** Plant" in certain described classifications comprising all the production workers other than those employed in the foundry (R. 32-33).[3]

The contract provided that:

> (j) The Union recognizes the right of the Company in its sole discretion at any time during the term of this agreement to close down permanently its plant at St. Charles or to discontinue permanently a department of the plant or a substantial portion thereof and terminate the employment of individuals (R. 45).

It further provided that:

> The employee whose employment is terminated either directly or indirectly as a result thereof because he was not entitled to other employment with the Company under the provisions of Article IV, Seniority, shall be entitled to a seniority termination allowance provided such termination for reasons set forth above occurred after March 1, 1961 (R. 45-6).

There followed in the contract a schedule for such termination allowance depending upon the employee's base rate of pay and years of service (R. 46), and a further provision that:

> *It is expressly understood at the expiration of this two year contract the company shall have the right to close down permanently the St. Charles plant, to relocate permanently any department thereof or discontinue permanently any such department, without seniority termination pay* (R. 46).

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[3] The foundry workers were represented by another union. See **Brown v. Sterling Aluminum Products, Inc.**, 365 F. 2d 651, 8th Circ. 1966, certiorari pending, No. 937 this Term.

The contract also sets up a conventional four-step grievance procedure, providing for arbitration as the fourth step (R. 39-41). The first required step is that the employee, shop steward and foreman attempt a settlement (R. 40).

No grievance was ever filed relating to the closing or removal of the plant or termination of the employees incident thereto (R. 230). Other grievances mentioned in the record were not carried ever as far as the first step, although plaintiff Woody had full authority to do so (Woody affidavit, R. 149).

NOTICE OF CLOSING.

By letter of December 26, 1962 Sterling duly notified the Union in writing that it would permanently cease all manufacturing at St. Charles at the close of business February 28, 1963 when the contract by its terms would expire (R. 89).

Also by letter of December 26, 1962 the Union notified Sterling of its desire to terminate the contract and its intention to submit proposed changes at an early date (R. 90-91), which it, in fact, did (R. 91 and 155-160).

In response to these communications, Sterling, on January 14, 1963, restated to the Union its intention to close permanently the St. Charles plant on February 28, 1963; that checks for the last week's work and for vacation pay would be distributed as soon as the amounts thereof could be computed; and that, since Sterling would not employ any production workers at St. Charles after February 28, 1963 and since the Union did not represent Sterling's employees at any other plant, no negotiation of any new contract would be undertaken; but Respondent in the same letter told the Union that:

> Nevertheless the Company is ready to continue meeting with the representatives of your organization

to discuss matters within the scope of the current contract which will terminate February 28, 1963 (R. 92-94).

THE PLANT CLOSING.

On February 27, 1963, Sterling notified the Union and each employee in person in writing that the St. Charles plant would close permanently at the end of the day February 28, 1963 and that each of the plaintiffs would be terminated as an employee at that time. This written notice to each plaintiff was accompanied by a check covering the employee's pay through February 24, 1963 and stated that the company was computing pay for February 25 to February 28, 1963, both days inclusive, "although you are not to return to work on February 28", and that a check for pay to the date of termination, plus vacation pay, would be mailed as soon as the amounts due could be computed which the Company said would not be later than March 5, 1963 (R. 94).

All the plaintiffs accepted payment for their employment through February 28, 1963 with their vacation pay, but they performed no productive work for Sterling on February 28, 1963 (R. 94, 100; Supp. R. 13).

The decision to stop production at the end of business on February 27, 1963, instead of waiting until February 28, 1963, was taken because of reports and other indications that on the final day there might be serious disorders and damage done to the Company's property, especially its sensitive precision equipment. To avoid such consequences the management determined that, without any advance notice, the employees would be denied access to the plant on the last working day, February 28, 1963, although they would be paid for a full day's work for that day and would not be terminated until midnight of February 28, 1963 (R. 95-100).

NO GRIEVANCE FILED ABOUT CLOSING OF PLANT.

Although plaintiffs seek to invoke the grievance procedure to "bargain and/or arbitrate . . . regarding the termination of their employment and the re-location of the manufacturing plant where they were employed". (Petition, pp. 2-3), the Court of Appeals found on the basis of the record that

> ". . . neither the plaintiffs nor the Union had attempted a discussion or filed any grievance with Sterling respecting the plant closure, its removal, termination of employees, despite Sterling's reiterating in writing on January 14, 1963 its plan to close, remove and terminate plaintiffs and its expression therein of its willingness to discuss any subject within the scope of the then current labor contract."
>
> 365 F. 2d 448 at 455; reprinted in Petition, p. 21.

DISTRICT COURT PROCEEDINGS.

The plaintiffs' original Complaint (Supp. R., pp. 1-19) was filed **September 13, 1963**, more than six months after the closing and moving of the St. Charles operation, the termination of all of the plaintiff employees, and their acceptance of their final pay including all vacation pay due them under the contract.

The First Amended Complaint was in four counts (R. 13-30). Sterling moved to dismiss all counts (R. 73 ff.). Sterling also filed a motion for summary judgment on Count III (R. 82 ff.), and the plaintiffs likewise filed a motion for summary judgment on Count III (R. 76). In January 1965, the District Court ruled in Sterling's favor on the Count III summary judgment motions, thus deciding Count III in Sterling's favor on the merits (R. 113, 117). At the same time it sustained the motion to dis-

miss Counts I, II, and IV, but granted leave to amend (R. 117) (244 F. Supp. 84).

Count III is a claim for money damages based on the proposition that, by closing its doors on February 27 rather than on February 28, 1963, Sterling became obligated to pay each employee the severance pay (R. 24-5). Plaintiffs' argument is that they were terminated **during** rather than at the expiration of the contract term, notwithstanding they were paid for February 28. Termination **after** the contract term was expressly sanctioned by the contract without liability for severance pay (R. 46).

The Court found that the notice given and the conduct of Sterling in closing the plant at midnight on February 27, 1963, did not constitute a termination of employment during the term of the Agreement, and that Sterling had not breached the contract in its refusal to pay seniority termination allowance to the plaintiffs (R. 113) (244 F. Supp. 84). This ruling was re-asserted in the District Court's subsequent opinion and judgment entered July 1, 1965 (R. 263-264; 243 F. Supp. 755).

Thereafter a second amended complaint was filed on January 30, 1965 (R. 121). Plaintiffs moved for a summary judgment against Sterling on Count I, asking in substance that Sterling be ordered to follow the contract "grievance procedure" and "commence to bargain" with plaintiffs over alleged contract violations which plaintiffs claimed had been made the subject of grievances.

Sterling and the Union each filed a motion to dismiss (R. 203, 220).

In its second and last opinion, the District Court

1. Held that the second amended complaint should be dismissed, without leave to amend, for gross disregard of Rule 8 (R. 234-5).

2. Reaffirmed its dismissal of Count III on the merits (R. 236, 264).

3. Held that plaintiffs were not entitled to an order directing either discussion or arbitration of any issue, because

a. The Union, as the record shows, was unwilling to press such grievances as were alleged in the various Court complaints (R. 247 ff.).

b. Sterling had not agreed to arbitration with anyone other than the Union (R. 250).

c. An order to engage in discussion would be fruitless (R. 251).

d. The controversy affects the entire unit and not merely individual employees (R. 252).

e. The individual employees involved had slept on whatever rights they had by failing to process the grievances (R. 255-6).

f. No grievance had even been taken to Step 1 (R. 258) and, on the facts of this case, considering also the judgment obtained by Sterling on the merits of Count III,

> "all the parties involved, the employer and the Union, as well as the employees, have repudiated, not merely waived, the arbitration and other grievance provisions . . ." (R. 257).*

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* The Record discloses that the Union and its officers, also parties defendant in this case, raised no objection to the submission on the merits of the issue under Count III and thus acquiesced in the waiver (or repudiation) by plaintiffs of arbitration of those issues. In paragraph 7 of the Union's Motion to Dismiss the Union averred that plaintiffs, by filing and submitting Count III, had made an election of remedies by basing their claim on the contract and asking a summary judgment thereon.

PROCEEDINGS IN THE COURT OF APPEALS.

The Court of Appeals:

1. Affirmed the District Court's dismissal of Count III (the claim for severance pay). While concurring in the reasoning of the District Court that the claim was without merit, the Court of Appeals took the view that dismissal of Count III was required by **Republic Steel v. Maddox**, 379 U. S. 650, 13 L. Ed. 2d 580, 84 S. Ct. 614 (1965), because no attempt had been made to assert the claim through the contractual grievance procedure, 365 F. 2d 448 at 451-53; reprinted in Petition, pp. 13-16.

2. Agreed with the District Court that the complaint could be dismissed under Rule 8 for failing to comply with the fundamental principles of good pleading, 365 F. 2d 448 at 454; reprinted in Petition, pp. 17-18.

3. Of the charge that the Union wrongfully abandoned the employees' claim, the Court of Appeals said:

> **The complaint uses language of hostile discrimination and similar wordage in characterizing the Union's activity when in fact there was no discrimination whatsoever as all employees were treated alike. Further, the broad and colorful language suggesting that the Union was inimical to its constituents was not supported by any allegation of bribery, preference or anything else that would be indicative of substance to plaintiffs' broad charges. We do not discuss these matters in more detail because their lack of substance makes them unimportant in the light of our opinion that all of the charges in the complaint fail to establish jurisdiction of the federal court over the issues here involved. . . .**

Moreover, in a footnote the Court of Appeals said (365 F. 2d 448, 455, footnote 8):

> Additionally, we have heretofore held that the Union alone has the right to negotiate broad policy issues such as re-negotiation of a new contract and relocation of a plant. The individuals have no vested interest in a company's operation being conducted at any certain location and Sterling had no duty to arbitrate this or any other issues that it had not agreed to arbitrate. See *Brown v. Sterling Alyminum Products, Inc.*, 365 F. 2d 651 (8th Cir. 1966).

4. Observed that under the contract Sterling had the right to move and held that **Republic Steel v. Maddox**, supra, was controlling because of the failure of the Union and of the employees to attempt use of the grievance procedure. The court said:

> . . . the (Contract) provision allowing Sterling to move its plant and terminate its employees resulted from negotiations during the course of a strike (in 1961) and was in fact the *ratio essendi* of the bargaining agreement. Neither the plaintiffs nor the Union ever sought to process any grievance on account of the plant's closing, employees' termination, or Sterling's refusal of jobs at other plants (365 F. 2d 448, 455).

and said further:

> we have only to look to the Woody affidavit to determine that the evidence before the District Court admittedly sufficed to conclusively show that plaintiffs have never attempted to process any unresolved grievance, even to Step 1 of the grievance procedure.

365 F. 2d 448 at 456; reprinted in Petition, p. 21.

5. Ruled that the doctrine of pendent jurisdiction would not permit the court to entertain Count I, because (a) there was no jurisdiction of Count III and (b) even if there had been, the two counts depend on different facts.

365 F. 2d 448 at 456; reprinted in Petition, pp. 21-22.

6. Held that the allegations of collusion and of the Union's failure to represent its members fairly were within the exclusive jurisdiction of the Labor Board.

365 F. 2d 448 at 456-57, reprinted in Petition, pp. 22-23.

As to Petitioners' No. 2 of "Questions Presented", it does not seem to involve Sterling for it refers only to "a claim for damages **against a Union** by its members for a breach of the Union's duty of fair representation" (Petition for Writ of Certiorari, p. 3, emphasis supplied).

Nevertheless, we point out that the Court of Appeals held that such charges "were not predicated upon the collective bargaining agreement so as to give the Court jurisdiction under Sect. 301 . . . were not contract oriented and not therefore, within the cognizance of federal and state courts" (365 F. 2nd 448, 456).

ARGUMENT.

I.

SECTION 301 GIVES THE DISTRICT COURT NO JURISDICTION TO ORDER THIS RESPONDENT TO "BARGAIN AND/OR ARBITRATE . . . REGARDING THE TERMINATION OF EMPLOYMENT AND THE RELOCATION OF THE PLANT"[1] BECAUSE NO CONTRACT VIOLATION IS ASSERTED AS THE BASIS FOR THE RELIEF SOUGHT.

The first, in order, of Petitioners' "Questions Presented" reads as follows:

> "1. Does this Court's mandate in Republic Steel v. Maddox, 85 S. Ct. 614 (1965), allow a unit of individual employees, who have been abandoned by their Union, to invoke the Grievance Procedure provisions of their labor agreement in order to bargain and/or arbitrate with their employer by and through their duly elected Chief Steward and Stewards, regarding the termination of their employment and the re-location of the manufacturing plant where they were employed?"[2]

This question presents no contract issue, but purely and simply the question whether Petitioners are entitled to an

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[1] Quoted from Petitioners' statement of "Questions Presented".

[2] Despite its verbosity, Count I of the Second Amended Complaint (R. 121) insofar as pertinent to the first of the questions on which the Petitioners seek to have certiorari granted, comes to nothing more than a claim that the company wrongfully refused to bargain over the shutdown and removal of the St. Charles plant. Thus at best Count I amounts to an allegation of unfair labor practices and not of contract violations. See Point III below.

order requiring the company to bargain, retroactively, over shutdown and removal of the St. Charles plant.

It is obvious that the District Court has no jurisdiction to entertain a suit for the relief sought here. We need only remember the following facts:

(a) *The right to close the plant was already bought and paid for.*

The only labor contract in the record was executed in 1961 in settlement of a protracted strike (R. 83). It remained in effect until February 28, 1963 (R. 63, 89-91). No provision of this contract required the company to bargain with the Union over shutdown or removal of the St. Charles plant. *On the contrary,* the contract expressly sanctioned the closing of the plant at the expiration of the contract term in these words:

> "It is expressly understood at the expiration of this two-year contract the Company shall have the right to close down permanently the St. Charles plant, to relocate permanently any department thereof or discontinue permanently any such department, without seniority termination pay" (R. 46).

One of the prime issues in the 1961 strike was the Union's demand for a severance pay clause (R. 83). The Contract which settled the strike provided severance pay ("Seniority termination allowance") for employees terminated during the period of the contract (R. 46). Correlative to a limited grant of severance pay rights, was the clause, quoted above, permitting the Company to close the St. Charles plant at the expiration of the contract, free of liability for severance pay. The quoted clause had been bargained for by the Company **two years before the closing of the plant.** Closing of the plant did not violate the contract,—it conformed to what the contract anticipated.

(b) *Petitioners are asking that the Company be ordered to negotiate a new contract, effective March 1, 1963.*

In the Statement portion of the Petition for Certiorari, plaintiffs say that in December 1962 the Union notified the Company that it wanted to negotiate a new labor agreement to take effect March 1, 1963, on expiration of the 1961 agreement, and sent to the Company "proposals intended to prevent the company from terminating the employment of these petitioners in the event of a shutdown and relocation of the St. Charles, Missouri, plant" (Petition, p. 4). The Company, states the petition, refused to bargain on any of these proposals.

Manifestly it was not a breach of the 1961 contract to refuse to bargain over contract proposals which would not take effect until **after** the 1961 contract had expired. Either party had the right to terminate the 1961 contract on February 28, 1963; in fact, notices were served by both the Union and the Company making that expiration date effective (R. 63, 89-91).

(c) *No request was made to the Company even to bargain over matters incidental to the closing.*

It is true that the Company declined to bargain over the Union's proposals for a *new* contract (R. 92-3). However, in the very same letter the Company said:

> "Nevertheless, the Company is ready to continue meeting with the representatives of your organization to discuss matters within the scope of the current contract which will terminate February 28, 1963" (R. 93-4).

No request for such discussion was ever made.

We confidently submit that the foregoing considerations make it impossible for the District Court to have juris-

diction under Section 301 of the part of this case represented by Petitioners' Question number 1.[3]

II.

EVEN ASSUMING (ARGUENDO) THAT THE PLANT CLOSING AND REMOVAL COULD BE THE SUBJECT OF A GRIEVANCE, NONE WAS EVER FILED. HAVING FAILED EVEN TO ATTEMPT CONTRACT PROCEDURES, PLAINTIFFS CANNOT INVOKE THE AID OF THE DISTRICT COURT.

In both the Second Amended Complaint (R. 121 ff.) and the Statement appearing in their Petition for Certiorari, Plaintiffs allude to the pendency of unsettled grievances. However, by checking the record references, it becomes apparent that no grievance was **ever** filed over the matter of plant closing and removal (R. 230; see also Woody

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[3] It is likely that the Court would have jurisdiction of Count III (claim for severance pay), assuming exhaustion of the grievance procedure. However, Petitioners are not seeking review of the dismissal below of Count III. Moreover, Count III was properly dismissed. The Court of Appeals said that the District Court had no jurisdiction of Count III because plaintiffs had not exhausted the grievance procedure. Further, it agreed with the District Court's finding **on the merits**, that plaintiffs were not entitled to any severance pay. The District Court thought itself warranted in tackling the merits, because the plaintiffs (by bringing suit), the Company (by moving for summary judgment on the merits of Count III) and the Union (by standing by as a party to the lawsuit) had not merely waived but actually repudiated arbitration. On the merits, the District Court ruled against the plaintiff's contention that they became entitled to severance pay because the Company, to guard against possible sabotage, closed the plant a day early but paid the employees as though they had worked through February 28, 1963; this did not amount to termination of the employees **during** the contract period, said both the District Court and the Court of Appeals. Thus plaintiffs have had a day in court on the severance pay question, and they had it at their own request **before** they gave any thought to requesting arbitration.

affidavit, R. 148 ff.). Accordingly, as both the District Court and the Court of Appeals have held, it follows from *Republic Steel Co. v. Maddox,* 379 U. S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 611, that plaintiffs' excursion into federal court has been in vain.

Other miscellaneous grievances were filed prior to the plant closing . . . one on the last day (R. 191). However, we learn from the affidavit of plaintiff Woody, the chief shop steward, that not even these grievances were carried to the first stage . . . and he's frank enough to say, under oath, that he was the person who had the power and responsibility to move these grievances forward (See Woody's affidavit, R. 148 ff.).

The Court of Appeals found these facts fatal to plaintiffs' right to come into the District Court, saying:

> "Concerning ourselves first with all claims that can be construed to be breach of contract, we only have to look to the Woody affidavit to determine that the evidence before the District Court admittedly sufficed to conclusively show that plaintiffs have never attempted to process any unresolved grievance, even to Step 1 of the grievance procedure. Thus, plaintiffs had no standing in the federal court on their alleged claims for breaches of contract which normally might give rise to Sec. 301 jurisdiction. Therefore, *Maddox* is controlling of all alleged breach of contract claims."
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> 365 F. 2d 448, 456, Petition, p. 21.

Furthermore, these miscellaneous grievances do not relate to plant removal and closing and, therefore, they have no relevance to the issue upon which a writ of certiorari is sought.

III.

IF THERE WAS A WRONGFUL REFUSAL TO BARGAIN OR UNLAWFUL COLLUSION BETWEEN THE COMPANY AND OFFICIALS OF THE UNION, THE MATTER IS ONE WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

Petitioners' Question No. 1 (for review on certiorari) is necessarily predicated on Count I of the Second Amended Petition, which asks for back pay and for an order requiring the Company

> "to commence to bargain in good faith with the Plaintiffs regarding . . . all of the reasons, terms and conditions which the Defendant, Sterling, can suggest to justify its decision intending to shut down its St. Charles plant;" (R. 137.)

Plaintiffs complain that the Company refused to bargain about closing the plant (R. 131) and that somehow the Company wrongfully colluded and conspired with officials of the Union to make it possible for the Company to move from St. Charles (R. 125 ff.). Clearly these allegations are charges of violations of the National Labor Relations Act. (Plaintiffs do in fact, without further explanation, cite that Act as an asserted source of the District Court's jurisdiction, R. 122).

If the case against the Company arises under the National Labor Relations Act, exclusive jurisdiction lies with the Labor Board and the District Court cannot entertain the case.

CONCLUSION.

This Brief is confined to the first question upon which a writ of certiorari is sought, since the second question relates exclusively to plaintiffs' claim against the Union and its officials.[1]

For the reasons stated herein, no Writ of Certiorari should be granted in respect to claims against Respondent Sterling Aluminum Products, Inc.

Respectfully submitted,

DANIEL BARTLETT,

WILLIAM STIX,
Attorneys for Respondent,
Sterling Aluminum Products, Inc.

Certificate of Service.

State of Missouri,
City of St. Louis.

I, Daniel Bartlett, one of the counsel and attorney of record for the Respondent, Sterling Aluminum Products, Inc., below, being duly sworn, says that on February 3, 1967 I served four copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari, as required by the Rules of the Supreme Court of the United States, (a) on the Petitioners by personally mailing such copies to Jerome J. Duff, Attorney for the Petitioners, at

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[1] For reasons already stated, we feel that there is no contract issue in this case and, accordingly that the Company could not properly be drawn into litigation of the fair representation issue, regardless of whether jurisdiction lies in the District Court or in the Labor Board.

his office in Suite 1155, 818 Olive Street, St. Louis, Mo. 63101, and (b) on the Respondent Labor Organizations and Officers by personally mailing such copies to Malcolm L. Bartley, Donald S. Siegel, William H. Bartley, and Bartley, Siegel & Bartley, their Attorneys, at 130 South Bemiston Ave., Clayton, Mo. 63105.

Daniel Bartlett,
Member of the United States
Supreme Court Bar.

APPENDIX.

John Woody et al., Plaintiffs,

v.

Sterling Aluminum Products, Inc., et al., Defendants.

No. 63 C 345 (3).

United States District Court,
E. D. Missouri, E. D.,
July 1, 1965.

(Reported in 243 F. Supp. 755.)

Regan, District Judge.

This matter is now before the Court on motions directed to all counts of plaintiffs' second amended complaint, other than Count IV, which has heretofore been voluntarily dismissed by plaintiffs. Also before the Court is plaintiffs' motion for a new trial on the Summary Judgment heretofore entered on Count III of plaintiffs' first amended complaint. The second amended complaint was filed pursuant to leave granted on January 26, 1965, after the Court sustained motions of various defendants to dismiss Counts I, II, and IV of the first amended complaint. A renewed "plethora of motions" has resulted.

Rule 8 (a) requires that every pleading setting forth a claim for relief shall contain both a short and plain statement of the grounds upon which the court's jurisdiction depends and a short and plain statement of the claim showing that the pleader is entitled to relief. Moreover, Rule 8 (e) requires that "[e]ach averment of a pleading shall be simple, concise, and direct." The second amended complaint is violative of Rule 8.

The complaint we are considering is plaintiff's third essay to state one or more claims for relief within the

jurisdiction of this Court. In attempting to defend their first amended complaint, and urging that they be allowed "to commence" a voyage in what they designated "as a relatively uncharted sea", plaintiffs conceded: "Plaintiffs are aware that the complaint herein is lengthy, involved and sometimes complicated in its terminology."

As applied to the second amended complaint, the foregoing characterization is an understatement. In this complaint, plaintiffs have not only retained the verbosity and the involved averments of the first amended complaint, but have woven additional allegations therein intermingling (often in the same sentence) numerous inconsistent statements. The statement of plaintiffs' claim is neither short nor plain. So, too, the averments of the complaint are neither simple, concise nor direct. Granted that the nature of this case may well require a more lengthy and detailed statement of plaintiffs' claims than would ordinarily be adequate, we nevertheless find no justification for the unduly prolix, involved, repetitious and confusing nature of the pleading.

By way of example, without any proper separation of the inconsistent allegations, plaintiffs plead that defendants conspired and colluded (and successfully) to draft the collective bargaining agreement so that it authorized, without legal liability, the very conduct which is alleged to constitute a breach of the agreement, and damages are sought both for the collusion and the breach of contract.

Although Rule 8 authorizes pleading in the alternative and without regard to consistency, we believe that at the very least inconsistent claims should be separately stated, so that the other party may be enabled to "state in short and plain terms his defenses to *each* claim" (Rule [8]). Defendants are confronted with an almost impossible task of preparing responsive pleadings unless the Court intervenes, and as to Count I, defendants must speculate as to

the number and nature of the claims plaintiffs intend to set forth. This problem is posed not merely by the wordiness or even the redundancy of the complaint, but also by the disorganized, and equivocal verbiage employed, replete with "and/or"s.

The second amended complaint wholly fails to "comply with the fundamental principles of good pleading." Cf. Catanzaritti v. Bianco, D. C. Pa., 25 F. Supp. 457; Collier v. First Michigan Cooperative Housing Association, 6th Cir., 274 F. 2d 467, and Kappus v. Western Hills Oil, Inc., D. C. Wis., 24 F. R. D. 123, 2 F. R. Serv. 2d, 4 F. 22, Case 2.

As we have noted, Rule 8 (a) also requires the pleading to set forth a short and plain statement of the grounds upon which the court's jurisdiction depends. In paragraph 1 of Count I (realleged and adopted by reference in each of Counts II, V and VI) plaintiffs assert that jurisdiction lies under various enumerated statutes of the United States, leaving to the Court and the other parties the task of analyzing and determining the relevancy and pertinency of the cited statutes to each claim and in relation to each of the defendants.

Some of the cited statutes appear to have been chosen at random. Thus, plaintiffs assert, but without any explanation, that the Court has jurisdiction of the action under the Railway Labor Act, 45 U. S. C. A., §§ 151 to 158. Plaintiffs also cite the Labor-Management Reporting and Disclosure Act of 1959, Title 29 U. S. C. A., §§ 401, 402, 411 to 415, and 433, all of which we have read in light of the averments of the complaint, but still remain at a loss as to their pertinency. Among other statutory citations, apparently picked indiscriminately are Sections 160 and 163 of Title 29, the National Labor Relations Act. There are, of course, other statutory provisions which conceivably could have application, but only as to some defend-

ants and to some claims. Enough has been stated to demonstrate that plaintiffs have not set forth a short and plain statement of the grounds upon which the court's jurisdiction depends, as contemplated by Rule 8.

Plaintiffs' derelictions in complying with Rule 8 have increased with each amended complaint. We hold that their gross disregard of the explicit requirements of Rule 8 (a) and (e) require the dismissal of the second amended complaint. Ordinarily, such a dismissal should be without prejudice, with leave to file still another amended complaint which, hopefully, will be in conformity with the requirements of the rule. In determining whether leave to amend should be granted in this case, we now consider the various motions filed by the defendants relating to the sufficiency of the second amended complaint both on the merits and on the question of jurisdiction. We also consider plaintiffs' motion for summary judgment. We bear in mind that a complaint (and this necessarily includes each count thereof) "'is to be liberally construed, and a dismissal is not warranted unless it is clear that plaintiff would be entitled to no relief under any state of facts that might be proved in support of the complaint.'" Fowler v. Southern Bell Telephone & Telegraph Company, 5th Cir., 343 F. 2d 150, 153. See also Conley v. Gibson, 355 U. S. 41, 47-48, 78 S. Ct. 99, 2 L. Ed. 2d 80, and Beacon Theatres, Inc. v. Westover, 359 U. S. 500, 506, 79 S. Ct. 948, 3 L. Ed. 2d 988.

As filed, the present complaint had six counts. Count IV is directed solely against defendants Larry Connors, Trustee, Bela Deutsch, Trustee, and Reverend Poelker, Trustee. On February 17, 1965, plaintiffs dismissed this count without prejudice. However, plaintiffs do not attempt to state any claim against these defendants in any other count of the complaint. It follows that this action should be dismissed as to said defendants for failure to state a claim.

The remaining defendants are Sterling Aluminum Products Co. (Sterling); International Association of Machinists (International); District No. 9, International Association of Machinists (Union); Local Lodge 41 of the International Association of Machinists (Local); Larry Connors, individually, directing business representative of District No. 9 (Connors) and Russell Davis, individually, business representative of District No. 9 (Davis). International, District No. 9 and Local are sometimes hereinafter referred to collectively as Unions, and Connors and Davis as labor officials or union representatives.

Count III, which affects only defendant Sterling, merely readopts and realleges by reference all of the paragraphs of Count III of the first amended complaint, expressly taking note, however, of the summary judgment which this Court heretofore entered against plaintiffs and in favor of defendant Sterling upon submission of their cross-motions for summary judgment on Count III. The reallegation of Count III of the first amended complaint apparently was due to plaintiffs' desire to avoid any contention that they have abandoned the claim by pleading over and to evidence their intention to preserve it. At the oral argument of plaintiffs motion for new trial on Count III, plaintiffs counsel stated that although he would not withdraw the motion he did not care to press it. The Court has duly considered the motion for new trial and has concluded that the motion should be and it is hereby overruled. However, we will hereafter advert to Count III and the claim therein stated in ruling the issues presented by the motions to dismiss Counts I, II, V and VI.

All defendants have moved to dismiss Count I and plaintiffs have filed a motion for summary judgment based on that count, but directed only against defendant Sterling. We briefly review the course of this proceeding in order to place the present motions in their proper prospective.

This suit stemmed from the action of Sterling, more than six months prior to the filing of the original complaint, in closing its St. Charles plant in which plaintiffs had been employed under a collective bargaining agreement negotiated on their behalf by District No. 9, as the bargaining agent of plaintiffs. Plaintiffs' motion for partial (money) summary judgment against Sterling, filed October 23, 1963, was rendered functus officio by the filing of plaintiffs' first amended complaint on November 16, 1963. On February 7, 1963, plaintiffs again moved for an order of a money summary judgment on Count III, and Sterling also filed a motion for summary judgment on the merits on that Count. In our memorandum opinion of January 21, 1965, 244 F. Supp. 84, this Court sustained Sterling's motion for summary judgment, overruled plaintiffs' similar motion, and sustained all motions of defendants to dismiss Counts I, II and IV of the first amended complaint, in part for lack of jurisdiction and in part for failure to state a claim on which relief can be granted. That memorandum opinion should be read in conjunction with the present opinion, although, regrettably, our disposition of the present motions will make it necessary to replow some of the ground covered by our earlier opinion.

We take note of the fact that in urging their various motions for summary judgment, plaintiffs have set forth "certain unassailable and indisputable facts and circumstances" which to the extent we find them relevant and "indisputable" we have taken into consideration in ruling the instant motions. See Civil Rule 12 (b) (6). The collective bargaining agreement, referred to as Exhibit "A" in the second amended complaint and alleged to be attached thereto has not in fact been so attached although it was annexed to the original complaint. We find this agreement also set forth in an affidavit filed by Sterling. And plaintiffs' motion for summary judgment refers to and relies upon that agreement. In these circumstances, we

consider Exhibit "A" before us for all purposes. As in Greater Kansas City Laborers Dist. Council v. Builders' Ass'n, D. C. D. Mo., 213 F. Supp. 429, 431, "[W]e shall * * * treat defendant's motion to dismiss as a motion for summary judgment in order that the entire collective bargaining agreement be a part of the record." See also International Longshoremen's & Warehousemen's Union v. Kuntz, 9 Cir., 334 F. 2d 165, 168, as to the propriety of treating a motion to dismiss for failure to state a claim as a motion for summary judgment.

We will not attempt to summarize the allegations of Count I, if for no other reason than that it contains too many details, conclusions and inconsistent averments. At page 5 of the second amended complaint, plaintiffs thus characterize this Count:

> "This Count of Plaintiffs' Complaint is predicated and founded upon an illegal and unlawful conspiracy and series of collusive acts comprising a deliberate, pre-determined and illegal plan and scheme contrived and entered into by the Defendant, Sterling, by and through it's (sic) agents and corporate officers, and the Defendant Labor Organizations and the Labor Organization Officials, Connors and Davis. The purpose of the collusion and conspiracy by and between these Defendants was to allow the Defendant, Sterling, to close down it's (sic) plant in St. Charles, Missouri, and permanently terminate the employment and union recognition of all of these Plaintiffs and to attempt to eliminate and avoid any contractual and/or legal liabilities to these Plaintiffs as a result of the permanent loss of their employment and the loss of the recognition of their Union."

In oral argument, plaintiffs contended that Count I contains much more than a simple conspiracy to do a specific wrong, and that plaintiffs would be entitled to various types of relief thereunder. In view of the liberal con-

struction to be accorded every pleading, we must therefore carefully examine Count I in order to discern what claims have been stated, no matter how defectively, on which relief may conceivably be granted.

Interwoven in the vague, general and verbose allegations of conspiracy and collusion by Sterling, the Unions and the labor officials "to discriminate with hostility against these Plaintiffs to deprive these Plaintiffs of their employment, their Union recognition, their contractual rights and benefits and their legal rights and benefits" (with major emphasis being placed on the collusive negotiation of the collective bargaining agreement so worded as to allow Sterling to accomplish the purpose of the conspiracy) are allegations that Sterling breached the agreement, for the most part at least, by doing the very things the contract authorized.

It appears to be plaintiffs' theory that enough is alleged to state a claim based on breaches of the collective bargaining agreement and, if so, that this Court has jurisdiction of that claim under 29 U. S. C. A., § 185 (Section 301 of the Labor Management Relations Act). Alleged as part of the acts engaged in by defendants in furtherance of the conspiracy are the following:

1) failure and refusal to file and/or process certain grievances in behalf of plaintiffs against defendant Sterling, even though plaintiffs repeatedly requested "that these grievances be filed and/or processed to a proper conclusion as proxided by the various provisions of the labor-agreement";

2) failure and refusal of Sterling "to bargain and/or arbitrate the intended closing of it's (sic) St. Charles plant and the effects of the plant closing on the Plaintiffs' employment, Union recognition and contractual rights even though the Plaintiffs made a written demand upon the Defendant, Sterling to bargain such matters";

3) failure and refusal of Sterling to pay plaintiffs seniority termination allowances (the specific matter adjudicated by the summary judgment on Count III);

4) failure of Sterling to pay to plaintiffs their full vacation credits for the year 1963;

5) refusal of Sterling "to employ any of the Plaintiffs in any other plants of the Defendant, Sterling, after the Defendant, Sterling, closed down it's (sic) St. Charles Plant and relocated the St. Charles Plant departments in other plants of Defendant, Sterling"; and

6) refusal of Sterling to "bargain over grievances."

Jurisdiction of claims for relief based on violation of a collective bargaining agreement is conferred upon district courts (without respect to the amount in controversy or without regard to the citizenship of the parties) by Section 301 (a) of the Labor Management Relations Act, 29 U. S. C. A., § 185 (a). See Textile Workers Union of America v. Lincoln Mills, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972. And where the agreement contains an arbitration provision the Courts have not only the authority under § 301 but the duty as well, in proper cases, to specifically enforce the agreement. United Brick and Clay Workers of America v. A. P. Green Fire Brick Co., 8 Cir., 343 F. 2d 590. If the grievance is one which on its face is governed by the contract, it makes no difference that the Court may deem the claim to be frivolous and completely lacking in merit under the terms of the agreement. "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." United Steelworkers of America v. American Mfg. Co., 363 U. S. 564, l. c. 569, 80 S. Ct. 1343, l. c. 1347, 4 L. Ed. 2d 1403.

Hence, where the issue in dispute is arbitrable (in the sense the parties have agreed to arbitrate that particular dispute), the rule is to order arbitration. United Steelworkers of America v. American Mfg. Co., supra; Builders Association of Kansas City v. Greater Kansas City Laborers District Council, 8 Cir., 326 F. 2d 867. Of course, it is now well settled that whether a dispute is arbitrable is for the Courts, although all doubts as to the coverage of the contract must be resolved in favor of coverage, so that arbitration is to be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers v. Warrior & Gulf Co., 363 U. S. 574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409. "[A] contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." Local 174 Teamsters v. Lucas Flour Co., 369 U. S. 95, 105, 82 S. Ct. 571, 578, 7 L. Ed. 2d 593.

The grievance clause to which Sterling is a party in this case is very broad.[1] It covers differences which may arise

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[1] "Section 3. Should differences arise between the Company and its employees either individually or collectively as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or if any trouble of any kind arises, an earnest effort shall be made to settle such differences at the earliest possible time by use of the following procedure:

"Step 1: The empolyee, the shop steward and the foreman shall attempt a satisfactory settlement of the grievance.

"Step 2: If no satisfactory settlement is reached between the employee, shop steward and the foreman, the grievance must be referred in writing to the Department Superintendent who shall attempt to settle the difference between the employee, shop stewards, foreman and chief shop steward.

"Step 3: If any grievance is not settled by the foregoing methods it shall be considered by a committee composed of the Business Representative designated by the Unions, an officer of the Company and the group listed in Step 2. In the event

between "the Company and its employees either individually or collectively as to the meaning and application of the provisions of this agreement," and differences "about matters not specifically mentioned in this agreement", as well as "trouble of any kind." It is obvious that at least some of the alleged grievances referred to in Count I (e. g., the alleged refusal to pay seniority termination allowances), even if wholly lacking in merit, are covered by the language of the arbitration clause.[2]

In view of the foregoing, we start with the premise that, absent compelling reasons to the contrary, it is the duty of the Federal Courts to give full play to the means chosen by the parties for settlement of their differences under a collective bargaining agreement. United Steelworkers of America v. American Mfg. Co., 363 U. S. 564, l. c. 566, 80 S. Ct. 1343; Textile Workers Union of America

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it becomes necessary for the Chief Steward to visit either the department office or the main office on a grievance, the Chief Steward shall be accompanied by the department Steward involved and the aggrieved employee involved.

"Step 4. In the event the Company and the Unions cannot agree upon the disposition of the grievance, any such matter shall be submitted to arbitration by an impartial Arbitrator to be selected by mutual agreement between the Company and the Unions. In the event the Company and the Unions cannot agree on selection of the Arbitrator within five (5) days (the time may be extended by mutual agreement) the Arbitrators shall be selected by the Company and the Unions from a panel of five (5) submitted by the Federal Mediation and Conciliation Service. The decision of the Arbitrator shall be final and binding on all parties. The Company and the Unions shall share equally the expense of the Arbitrator and each shall bear its own expense of the arbitration. Should the Company refuse to arbitrate any dispute as herein set forth, the Unions shall be free to strike.

"Any agreement or settlement of differences arrived at between the Company and the Unions pursuant to this Section shall be reduced to writing."

[2] In our memorandum opinion of January 21, 1965, we so ruled, but held, in effect that the parties had jointly acquiesced in waiving the application of that clause.

v. Lincoln Mills, 353 U. S. 448, l. c. 455, 77 S. Ct. 912. How then stands this case?

The parties to the collective bargaining agreement are Sterling, designated as the Company, and District No. 9, designated as the Union. Initially, we note that the present action is brought by individuals, all of whom are alleged to be former employees of Sterling, and not by the Union or other duly certified bargaining agent. This immediately poses the question: May an individual employee or former employee, either alone or in conjunction with other such individuals obtain an order specifically enforcing an arbitration agreement between the company and the union, particularly where, as here, whatever the reason, the Union will not maintain or support such an action?

Smith v. Evening News Assn., 371 U. S. 195, 200, 83 S. Ct. 267, 270, 9 L. Ed. 2d 246 emphasizes that at least *some* "suits to vindicate individual employee rights arising from a collective bargaining contract" are within the coverage of § 301. Suits "to compel arbitration of such individual grievances as rates of pay, hours of work and wrongful discharge" may be maintained. Textile Workers of America v. Lincoln Mills of Ala., 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; General Electric Co. v. Local 205, UEW, 353 U. S. 547, 77 S. Ct. 921, 1 L. Ed. 2d 1028. So, too, may actions "to obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to individual employees, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U. S. 593 [80 S. Ct. 1358, 4 L. Ed. 2d 1424]." And suits having as their purpose the recovery of wage increases "in a contest over the validity of the collective bargaining contract, Dowd Box Co. v. Courtney," 368 U. S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483, are within the jurisdiction of the Court under § 301. Clearly, the claim here under consideration is "of a type the Courts are empowered to determine under § 301." That the claim

asserted may also be an unfair labor practice subject to the primary jurisdiction of the National Labor Relations Board (or even arguably so, San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 733, 3 L. Ed. 2d 775) does not exclude jurisdiction of the Courts if the suit is a § 301 action for violation of a contract between an employer and a labor organization. Todd Shipyards Corporation v. Industrial Union of Marine and Shipbuilders Workers, 2 Cir., 344 F. 2d 107, 108; Smith v. Evening News Assn., supra; Dowd Box Co. v. Courtney, 368 U. S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483; and Local 174, Teamsters v. Lucas Flour Co., 369 U. S. 95, 101, footnote 9, 82 S. Ct. 571, 7 L. Ed. 2d 593.

The foregoing cases do not answer the question here posed, that is, whether these plaintiffs have standing to sue for specific enforcement of the arbitration clause. Significantly for present purposes, Lincoln Mills, General Electric and Dowd Box were each brought by Unions (or, as in Dowd, by union officers in their official capacity). True, Smith v. Evening News Assn., 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246, establishes that an individual employee may maintain a § 301 suit "to vindicate (his) rights arising from a collective bargaining contract." Smith was an action for wages which the employer had refused to pay in alleged violation of a "no-discrimination" clause in the contract. The right involved was truly personal to the individual employee. What the Smith case teaches is simply that § 301 does "not exclude *all* suits brought by employees and not by unions." The question of an employee's standing to sue was left open, particularly as to "other clauses in other contracts". See 371 U. S. l. c. 201, footnote 9, 83 S. Ct. l. c. 270. As stated by Mr. Justice Black, dissenting, 371 U. S. l. c. 204, 83 S. Ct. l. c. 272 "[T]he Court studiously refrains from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a § 301 action

and when he must step aside for the union to prosecute his claim." Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370, which was also brought by individual employees was an action to enjoin their discharge in alleged violation of the collective agreement, pursuant to a decision rendered under the contractual grievance procedure on the ground the decision complained of was allegedly procured by the fraudulent and dishonest conduct of the union representatives. The majority opinion held that Moore had standing to sue under § 301, the action being one "to enforce a collective bargaining contract," but that on the merits he failed to prove his case. The right sought to be vindicated was "uniquely personal."

None of these Supreme Court decisions (and plaintiffs cite no others) hold that an individual employee may maintain a § 301 action to specifically enforce an alleged right to *arbitrate* a grievance, particularly when, as here, the union is unwilling to do so. Nor do any of the many other cases to which plaintiffs have referred us justify the exercise of § 301 jurisdiction over this type of claim when prosecuted by an individual and not by the union of which he is a member. And as we read the cases, they are inconsistent with any such right of action on the part of plaintiffs.

"The right to arbitrate under a collective agreement is not ordinarily a right incident to the employer-employee relationship, but one which is incident to the relationship between employer and union." Procter & Gamble Independent Union v. Procter & Gamble Manufacturing Company, 2 Cir., 312 F. 2d 181, l. c. 184; Carey v. General Electric Company, 2 Cir., 315 F. 2d 499. We have noted that the contracting parties to the collective agreement are District No. 9 and Sterling. Article III, Section 4 of the Agreement provides: "The parties agree that as a part of the consideration of this contract any and all disputes and

any and all claims, demands or action growing therefrom or involved therein shall be *by the contracting parties* settled and determined exclusively by the machinery provided in the preceding Section" (which provides for a four step grievance procedure culminating in arbitration).

Black-Clawson Co., Inc. v. International Ass'n of Mach., 2 Cir., 313 F. 2d 179, held that an individual employee could not individually prosecute a grievance against an employer through the various steps called for in the bargaining agreement or force the employer to arbitrate the grievance, even though the agreement defined "grievance" as a dispute between the company and the union or the company and any employee. We note that step four as set forth in Section 3 of the instant agreement requires the Company and the *Union* to submit to arbitration by an impartial arbitrator, and as in Black-Clawson, supra, the company and the *union* are required to share equally the expenses of the arbitrator and each must bear its own expense in arbitration. The Court there said,

> "The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union." 313 F. 2d, l. c. 186.

The foregoing statement was quoted with approval in Belk v. Allied Aviation Service Co. of New Jersey, Inc.,

2 Cir., 315 F. 2d 513, 517. See also Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co., 2 Cir., 312 F. 2d 181, 184, 185, and Ostrofsky v. United Steelworkers of America, 171 F. Supp. 782, holding that under the grievance clause considered as a whole the union has the sole right to process grievances; and Local Union No. 12405, Dist. 50, U. M. W. v. Martin Marietta Corp., 7 Cir., 328 F. 2d 945, cert. denied, 379 U. S. 880, 85 S. Ct. 147, 13 L. Ed. 2d 87, ruling that under the terms of the contract only the international union, as the collective bargaining agent, could avail itself of the procedures prescribed in the collective bargaining agreement, and therefore even the local union on "behalf" of which the agreement was entered into could not demand arbitration of grievances over the international's objection. Cf. Local No. 824, United Brotherhood of Carpenters v. Brunswick Corporation, 6 Cir., 342 F. 2d 792, in which the union first refused to seek arbitration, then joined in the action.

Plaintiffs cite Retail Clerks International Association v. Lion Dry Goods, Inc., 6 Cir., 341 F. 2d 715, but in that case the agreement (Statement of Understanding) expressly limited the right of arbitration to "[a]ny *individual employee* who may have a grievance," and gave no right of arbitration at all to the union.

That the Union should have the right to control resort to arbitration would appear on principle to be correct. As the collective bargaining representative, its duty is not merely to negotiate but to administer the collective agreement. The very fact that "[t]he grievance procedure is a part of the continuous collective bargaining process" (General Warehousemen & Employees Union No. 636 v. American Hardware Supply Co., 3 Cir., 329 F. 2d 789, 792; United Steelworkers of America v. Warrior & Gulf Co., 363 U. S. 574, 581, 80 S. Ct. 1347, 4 L. Ed. 2d 1409), serves to emphasize the conclusion that such "collective bar-

gaining'' can be conducted only by the authorized and recognized representative of the employees. Humphrey v. Moore, 375 U. S. 335, 349, 84 S. Ct. 363, 372, 11 L. Ed. 2d 370, adverts to the fact that in performing its duty, a union must be free not only to sift out wholly frivolous grievances but also must ''be free to take a position on the not so frivolous disputes.'' The Union, acting as the representative of all members of the bargaining unit, must necessarily be vested with discretion to determine when and the circumstances under which resort to the grievance procedures should be had.

Nothing in Section 9 (a) of the Labor Management Relations Act, 29 U. S. C. A., § 159 (a), which authorizes the presentation and adjustment of individual grievances of an employee independently of the bargaining representative (provided the adjustment is not inconsistent with the terms of the collective agreement), confers ''upon an individual grievant the power, enforceable in a court of law, to compel the employer to arbitrate his grievance.'' This provision does not create ''an indefeasible right mirrored in a duty on the part of the employer.'' It merely grants the employee ''the privilege to approach his employer on personal grievances'' and safe-guards the employer who voluntarily processes employee grievances ''at the behest of the individual employee'' from being guilty of an unfair labor practice by ''running afoul of the 'exclusive bargaining representative' language of the operative portion of section 9 (a).'' Black-Clawson Co., Inc. v. International Ass'n of Machinists, 2 Cir., 313 F. 2d 179, 184-185.

True, plaintiffs charge Sterling with failure to ''bargain collectively'' (primarily over the plant closing) as well as failure to arbitrate (''bargain and/or arbitrate''), and they seek an order requesting Sterling ''to commence to bargain'' with them. However, even though an employer's failure to ''bargain'' respecting a plant closing

or "contracting out" work may in some circumstances constitute an unfair labor practice (Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U. S. 203, 215, 85 S. Ct. 398, 13 L. Ed. 2d 233; Textile Workers Union of America v. Darlington Manufacturing Co., 380 U. S. 263, 85 S. Ct. 994, 13 L. Ed. 2d 827, both cited by plaintiffs), this Court is not the forum for prosecution of unfair labor practices. Aggrieved parties are remitted to the National Labor Relations Board for appropriate relief.

Moreover, an employer is obligated to "bargain" concerning such matters and others which are statutory subjects of mandatory collective bargaining only with the duly recognized or accredited representative of the employees. May Department Stores Co. v. Labor Board, 326 U. S. 376, 383-384, 66 S. Ct. 468, 90 L. Ed. 495. The complaint in this case expressly alleges that District No. 9 was certified as the exclusive bargaining agent in behalf of plaintiffs "in accord with the provisions of the National Labor Relations Act of the United States." Under the statute, the "bargaining" must be "collective", through "representatives." Plaintiffs as individuals may not compel Sterling to "bargain" with them.[3]

[3] We note that the "indisputable" facts of record, evidenced by the collective agreement, demonstrate that the parties to the contract (Sterling and the Union) actually "bargained" with respect to the right of Sterling to close its St. Charles plant and relocate its facilities. The results of that bargaining were the express contractual provisions recognizing the right of Sterling "to close down permanently the St. Charles plant, to relocate permanently any department thereof or to discontinue permanently any such department." Although plaintiffs complain that these and other provisions of the agreement (e.g., the limited recognition clause) were bargained for in bad faith, they nevertheless concede that the contract as negotiated is binding upon them and seek § 301 relief on that theory. They are, therefore, in any event in no position to insist upon renewed bargaining as individuals over issues that were resolved two years earlier when the instant contract was negotiated and the strike settled.

In apparent recognition of their dilemma, plaintiffs' motion for summary judgment prays inter alia for an order of this Court requiring Sterling to recognize the shop steward plaintiffs "as the 'labor organization representatives', 'labor organization officials,' 'union representatives,' 'union' or 'business agents' as those terms are defined and used throughout the labor laws of the United States and the labor agreement" in order to continue the "bargaining" beyond the initial two steps of the grievance procedure. Plaintiffs have not, however, suggested any legal basis for this Court to usurp the exclusive primary jurisdiction of the National Labor Relations Board.

The mere fact, if so, that the authorized bargaining representatives of plaintiffs may have arbitrarily and in bad faith refused to process legitimate grievances does not operate to expand the jurisdiction of this Court. Nothing in Hiller v. Liquor Salesmen's Union Local No. 2, 2 Cir., 338 F. 2d 778, relied on by plaintiffs, supports their position that bad faith on the part of the union (even when joined in by the employer) vests the Court with jurisdiction to oust the union as the contracting party and order arbitration at the suit of an individual employee. On the contrary, what was there held was that where the damage action is based upon an alleged conspiracy between the employer and the union to deprive the employee of his rights, enforcement of the arbitration clause (at the employer's instance) would be inappropriate and should be denied. The rationale of the ruling was that under the contract (as here) the arbitration procedure would be under the control of the very party which the employee "claims refused him fair representation, and it would present as adversaries in the arbitration procedure the two parties who, the employee claims, are joined in a conspiracy to defraud him," and therefore the right to sue on the claim cannot be defeated by relegating

the employee to an arbitration to which he has not agreed. It is equally true that Sterling has never agreed to any arbitration other than one with the union.

Plaintiffs urge, however, that steps 1 and 2 of the grievance procedure may be taken without affirmative action by the union as such (although even here, the shop stewards, as minor union representatives, participate in the discussion), and therefore as individual employees they may resort to a § 301 action to enforce compliance at least with these preliminary steps, even if they may not ultimately compel arbitration. We do not agree, particularly in the factual situation here presented.

Steps 1 and 2 are truly procedural steps, intended to permit voluntary disposition of grievances and thereby avoid, if possible, the expenditure of time and money both by the union and the employer consequent upon compulsory arbitration. They serve no other purpose. We have been cited to no authority either granting or sustaining an order compelling compliance with procedural requirements of a grievance clause preliminary to arbitration. The numerous cases which discuss alleged failures to comply with preliminary steps do not even remotely intimate that specific performance is appropriate. The Courts have considered the question of the necessity of compliance with such steps only as it bears upon the procedural arbitrability of the grievance. The latter issue has now been resolved by the Supreme Court. John Wiley & Sons, Inc. v. Livingston, 376 U. S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898, affirming Livingston v. John Wiley & Sons, Inc., 313 F. 2d 52; and see Bevington & Basile Wholesalers, Inc. v. Local Union No. 46, 8 Cir., 330 F. 2d 202; Local No. 824, United Brotherhood of Carpenters v. Brunswick Corporation, 6 Cir., 342 F. 2d 792, 794; and Avco Corporation, Electronics and Ordnance Division v. Michell, 6 Cir., 336 F. 2d 289. Livingston teaches that irrespective of com-

pliance with the preliminary steps of the grievance procedure, a right to specific performance of the arbitration clause is not affected. Whether there has been a failure on the part of either party to comply with the preliminary procedures, as well as whether there is a justification for any such failure, may be determined only by the arbitrator in deciding the merits of the grievance and not by the Court.

The essential differences between the voluntary disposition of a grievance by the parties themselves and the compulsion of arbitration in the resolution of the dispute point up the futility of any compulsory "discussion" of the grievances in the factual situation of this case. Sterling, on the management level, has long since explicitly rejected plaintiffs' demands on their merits. The Union, as plaintiffs' bargaining representative, has taken an adverse position on their alleged grievances. Under the admitted facts, the Union, whether rightly or wrongly, does not deem the grievances to have sufficient merits to justify arbitration, so that even if there were formal and nominal compliance with steps 1 and 2, such compliance would do no more than lead the parties up a blind alley of fruitless discussion. It is self-evident that at this late date compliance with steps 1 and 2 could not possibly result in a voluntary settlement of the alleged grievances.

Moreover, resort to the preliminary steps would not be appropriate where, as in this case, the "controversy" affects the entire bargaining unit (as well as all other employees) and not merely individual employees in a particular department of the plant. The face of the contract reveals that the St. Charles plant, during the period it was in operation, had a number of departments (possibly as many as seven), each of which presumably had at least one foreman and probably more in those departments which operated more than one shift. Under plaintiffs'

theory, as applied to the language of the grievance clause, each of these foremen would be required to separately discuss the same basic issue with those of the plaintiffs who had formerly been employed under his supervision. Compounding the confusion would be the fact that more than two years have elapsed since the admittedly permanent closing of the St. Charles plant. Unquestionably, the St. Charles foremen have long since departed, even though some of them may now be employed at other plants.

Of course, the foreman did not vanish when the plant was closed permanently (Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580), but surely his existence and particularly his limited authority to discuss individual grievances do not continue forever. Whether the St. Charles plant should be closed and who should be employed at other plants operated by Sterling involve basic company policy, truly decisions which can be made only at the management level. No individual foreman or group of foremen, or even department superintendents have the authority to overrule decisions of their superiors with respect to company policy, and particularly so many years after the decisions have been made and fully implemented. Hence, even if this Court had the power to make an order requiring resort to steps 1 and 2, such an order would be completely meaningless. We add that any employer who refused without justification to discuss a grievance through its foreman would be in no position to defend a damage action on the basis of its own default. Under the averments of the complaint, liberally construed, plaintiffs, to paraphrase Maddox, have *attempted* use of this preliminary step of the grievance procedure. If so, no more should be required of them. We note in this connection that at no time during the course of the instant litigation has Sterling ever contended that the alleged failure to comply with preliminary steps 1 and 2 bars the maintenance of this action.

Republic Steel Corporation v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580, although holding that the discharged employee's breach-of-contract action for severance pay was barred because of his failure to utilize the grievance procedures, is clearly distinguishable. In Maddox, the employer consistently objected to the maintenance of the action, and the union was not shown to have acquiesced in or supported the lawsuit. What Maddox teaches is that an individual employee has no unilateral right "to completely sidestep available grievance procedures in favor of a lawsuit," and thereby foreclose the contractual right of the union to determine whether the alleged grievance should be submitted to arbitration. Unless the contract provides otherwise, "the employee must afford the union the opportunity to act on his behalf," and "must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress."

In the instant case, plaintiffs have alleged, from the very inception of this litigation, that although ample opportunity has been afforded the union to process their grievances, the union has adamantly and in bad faith refused to press their claims. They allege, in substance, they have *attempted* use of the contract grievance procedure. Additional monetary relief is sought for the very reason that the union has allegedly improperly refused to act on behalf of plaintiffs. Maddox has express reference to "the normal situation," not the abnormal situation here alleged, and leaves open the question of the form of redress when "the union refuses to press or only perfunctorily presses the individual's claim."

We suspect, from a reading of the pleadings, the motion for summary judgment, and the briefs, that plaintiffs' real purpose in seeking specific performance (to any extent no matter how limited) is to obtain, if they can, the ancillary relief they have also prayed for, namely, an order

requiring Sterling to restore the status quo ante by the payment to plaintiffs of all wages and benefits to which they would have been entitled had not their employment been terminated and to continue to make such payments "pending the conclusion of the bargaining and/or arbitration" between the parties. However, an order such as plaintiffs seek is beyond the jurisdiction of this court. Cases affirming and enforcing comparable orders of the National Labor Relations Board (Fibreboard v. National Labor Relations Board, 379 U. S. 203, 215-217, 85 S. Ct. 994, 13 L. Ed. 2d 827) or awards of arbitrators (United Steelworkers v. Enterprise Wheel & Car Corp., 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 1424; cf. Textile Workers Union of America v. Lincoln Mills, 353 U. S. 448, 459, 77 S. Ct. 912, 1 L. Ed. 2d 972, are beside the point. The power of the National Labor Relations Board to make such orders is conferred by the National Labor Relations Act, Section 10 (c), 29 U. S. C. A. § 160 (c), and whether such power shall be exercised in any case is for the Board and not for the Court, National Labor Relations Board v. Seven-Up Bottling Company of Miami, Inc., 344 U. S. 344, 348, 73 S. Ct. 287, 97 L. Ed. 377. And the authority of an arbitrator to make such an award is dependent upon the language of the contract, so that when the Court enforces the award it is granting relief under the contract and not exercising jurisdiction independent thereof.

Even if there was a legal basis for an individual employee or former employee to obtain specific performance of the preliminary grievance procedures prescribed by the contract here involved, it is our opinion that under the undisputed facts plaintiffs are now precluded as a matter of law from obtaining such an order.

The contract calls for an earnest effort to settle the differences between the parties "at the earliest possible time." It would appear that "the earliest possible time" has long since passed, and with plaintiffs' conscious acquiescence

as evidenced by the course of this litigation. We believe that as a matter of fundamental fairness employees who have grievances they desire to process should not be permitted to sleep upon their rights while exploring other legal means of redress. Surely, there must eventually come a time when such an employee, with full knowledge of his union's refusal to act, will be held by his conduct to have waived or abandoned the mode of redress spelled out in the contract as the exclusive machinery for resolving disputes.

The Supreme Court has recognized that the parties to a collective bargaining agreement (and in this context, under plaintiffs' theory, individual employees would necessarily be included) may repudiate a right to arbitrate their disputes. Drake Bakeries v. Bakery Workers, 370 U. S. 254, 262, 82 S. Ct. 1346, 8 L. Ed. 2d 474. As we view the admitted facts, plaintiffs (and the other parties) have long since repudiated any right they might otherwise have had to an order specifically enforcing the grievance clause. Although, as noted in Minnesota Joint Board v. United Garment Mfg. Co., 8 Cir., 338 F. 2d 195, the use of the terms "waiver" and "estoppel" may be ill-chosen in this area, the word "repudiation" clearly conveys the thought that a party has demonstrated its intention that it would not submit the matter to arbitration if it were called upon to do so.

This suit was filed six months after the termination of plaintiffs' employment. The original complaint contained not a single word intimating a desire on the part of plaintiffs to resort to the grievance process. Instead, substantial money damages of many millions of dollars was sought. Nor did the first amended complaint advert to the grievance procedures of the contract or seek performance thereof. Again, only a substantial money judgment was sought. In connection with both complaints, plaintiffs filed motions for summary judgment, the judgment sought,

in each instance, being for money and money alone. This conduct is utterly inconsistent with the requirements of the grievance clause. The second of these motions was submitted to the Court in conjunction with Sterling's similar motion. Not until the second amended complaint was filed, almost two years after the plant had closed, did plaintiffs judicially intimate any intention to utilize the grievance procedure as individuals, and then only after they had lost on the merits their damage claim asserted in Count III. And during this two year period, the St. Charles plant had closed beyond all possibility of reopening. Here, we have "a fundamental and long lasting change in the relationship of the parties prior to the demand for arbitration", a circumstance not present in Local No. 721 United Packinghouse Workers v. Needham Packing Co., 376 U. S. 247, 253, 84 S. Ct. 773, 11 L. Ed. 2d 680.

In Minnesota Joint Board v. United Garment Mfg. Co., supra, the Court found nothing more than a prior disregard by both parties of the right to seek timely arbitration, as distinguished from conduct evidencing a repudiation of the obligation. In that posture of the case, it was held that neither party could deprive the *other* of its right to arbitration, certainly not by the mere unilateral act of making the controversy the subject of a claim for legal damages against the other. Here, Sterling has never sought to stay this action or require the alleged controversy to be submitted to arbitration. To the extent Sterling has been "deprived" of a right to arbitration, it has acquiesced in and consented to such deprivation. Sterling has not objected and is not complaining that plaintiffs have attempted to "deprive" it of the right of arbitration. Rather, it is plaintiffs who, after having made the controversy the subject of a claim for legal damages against Sterling and prosecuting that claim for some 18 months, during which time a portion of the claim was ad-

judicated adversely to plaintiffs on the merits, now have second thoughts on the subject.

We have already adverted to the fact that the union has been afforded the opportunity to act on behalf of plaintiffs, but has refused to press their claim. And when note is taken of the fact that Sterling sought and obtained a judgment on the merits of Count III of the first amended complaint, we believe it clear on the facts here for decision that all the parties involved, the employer and the Union, as well as the employees, have repudiated, not merely waived, the arbitration and other grievance provisions of the collective agreement.

Insofar as concerns plaintiffs' latest motion for summary judgment what we have heretofore said is dispositive. In addition, even if this Court could otherwise now compel Sterling, at the suit of plaintiffs, to comply with the grievance procedures of the contract, plaintiffs have made an insufficient showing on the instant record. If it be assumed, as plaintiffs allege, that none of their "grievances were processed by Sterling, or even by the Union (and the Exhibits filed by plaintiffs bely any such assumption), such fact of itself, without more, would not entitle plaintiffs to a summary judgment compelling Sterling to commence bargaining at step 1 which provides, "The employee, the shop steward and the foreman shall attempt a satisfactory settlement of the grievance."

Compliance with step 1 requires action not merely by Sterling's foreman, but by the aggrieved employee and the shop steward as well. The record before us does not factually demonstrate whether there was any request made to his foreman by any employee and shop steward to "attempt a satisfactory settlement of the grievance." The affidavit of plaintiff Woody which was filed in support of the motion for summary judgment merely states: "Affiant further states that each of the Exhibits identified as 'Grievances' and numbered Exhibit 3 (a through h) have

been duly filed with the Defendant, Sterling. These Grievances have never been processed beyond the mere act of filing the Grievances. No Grievance was ever taken to step One as provided in Exhibit A (Page 8). The processing of the said Grievance in behalf of Machinist Union employees of Defendant, Sterling is one of the responsibilities of this Affiant as Chief Shop Steward." Neither Woody nor any other shop steward plaintiff has attempted to explain what would appear to be a failure on their part to carry out the responsibilities imposed on them in the first step of the grievance procedure. On this record, we do not know whether or, if so, when Woody or any other plaintiff during the two years intervening between the time of the plant closing (and the resultant termination of their employment), and the filing of the present motion for summary judgment actually attempted to seek out the foreman for the purpose of discussing their alleged grievances.

Merely because neither Woody nor the other plaintiffs have "refused" to "bargain" with Sterling regarding any grievance or regarding the reason Sterling closed its St. Charles plant, or even because plaintiffs are now ready to so "bargain" does not of itself place Sterling in default of its contractual obligation to discuss the grievances through its foremen, sufficient to warrant the grant of a summary judgment by this Court compelling compliance by Sterling as the defaulting party. A default on the part of the employer, as distinguished from a mutual failure to act, is one of the material facts which must appear. Hence, whatever it is that plaintiffs now seek (whether it is compliance with step 1 or 4 or any intermediate step of the grievance clause) this Court may not order compliance summarily. Plaintiffs have wholly failed to sustain their burden of showing that there is no genuine dispute as to ***all*** **of the essential material facts.**

In view of all the foregoing, plaintiffs' motion for summary judgment should be and is hereby overruled.

We next consider plaintiffs' claim for relief based on the alleged collusion and conspiracy, essentially the same claim heretofore asserted in Count I of the first amended complaint with respect to which we sustained defendants' motions to dismiss. Further consideration convinces us that our original disposition was correct.

Taking note of the observation in our memorandum opinion of January 21, 1965 that no discrimination, hostile or otherwise, was asserted as a basis for their claim, plaintiffs have now interpolated into the allegations of the conspiracy charge vague conclusions of allegedly "hostile discrimination", this phrase evidently being used by plaintiffs simply as words of color to characterize the allegedly collusive actions of the unions. However, the pleaded facts demonstrate there was no discrimination at all.

Where a union is the duly authorized bargaining agent it must represent all employees fairly, whether or not they are members of the union, and may not abuse its statutory powers to discriminate against some of the employees it represents. The duty of fair representation is not derived from the collective bargaining agreement, but is implied from the union's rights and responsibilities conferred by federal labor statutes, Humphrey v. Moore, 375 U. S. 335, 356, 84 S. Ct. 363, 11 L. Ed. 2d 370 (Goldberg, J. concurring).

Typical of cases involving individual or class claims based on a union's alleged breach of duty to represent all employees without hostile racial discrimination are Syres v. Oil Workers International Union, 350 U. S. 892, 76 S. Ct. 152, 100 L. Ed. 785, reversing 5 Cir., 223 F. 2d 739; Steele v. Louisville & Nashville Railroad Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187; and Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, 72 S. Ct. 1022, 96

L. Ed. 1283. So, too, Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80, held that the bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not end with the making of an agreement between union and employer. Collective bargaining is a continuous process, so that the union may no more unfairly discriminate in protecting an employee's rights allegedly secured by the contract than in negotiating the collective agreement.

We add that although most cases of hostile discrimination involve racial discrimination, jurisdiction of the courts is not so limited, but the action may be maintained whether the discrimination is based on race or some other ground. Haley v. Childers, 8 Cir., 314 F. 2d 610, 617. A comparable case is Ford Motor Co. v. Huffman, 345 U. S. 330, 337, 338, 73 S. Ct. 681, 97 L. Ed. 1048, holding that the bargaining representative owes complete loyalty to all whom it represents, and must make an honest effort to serve the interests of all members of the bargaining unit, without hostility.

Stripped to its essentials, the conspiracy claim is premised on allegedly bad faith bargaining between Sterling on the one hand and representatives of the union on the other. Absent bad faith, there would be no impropriety in negotiating the collective agreement containing the specific terms and limitations therein of which plaintiffs now complain. Nor would there be any impropriety on the part of the union in refusing to further process some of plaintiffs' alleged grievances. As was said in Ford Motor Co. v. Huffman, 345 U. S. 330, 337, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048. "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages, as in the light of all relevant considerations, they believe will best serve the interests of the parties

represented." Again, "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." We note that in both Huffman and Moore (375 U. S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370) the Supreme Court found as facts the existence of good faith and honesty of purpose.

In Moore, the union was charged with dishonesty in the settlement of grievances at issue under the collective bargaining agreement in breach of its duty of fair representation, and on that theory Moore filed a class action on behalf of the employees adversely affected seeking to enjoin the implementation of a decision which would result in his discharge. A majority of the Court held that the action was properly brought under § 301 (on the theory that under the circumstances alleged the decision fraudulently procured would not be a valid basis for Moore's discharge, so that the discharge would constitute a violation of the contract), and therefore found it unnecessary to determine whether a violation of the duty of fair representation owing to an individual employee either is or arguably may be an unfair labor practice under the Labor Management Relations Act.

Plaintiffs rely upon Hiller v. Liquor Salesmen's Local No. 2, 2 Cir., 338 F. 2d 778. The complaint in that case alleged a conspiracy between an employer and a union directed against a single individual to deprive him of his employment rights. The Second Circuit construed the claim as one based upon the denial by the union of the right of fair representation, and on that theory held that plaintiffs, as the representatives of the deceased employee, were entitled to maintain an action for damages. The Hiller case is distinguishable because it is one involving "hostile discrimination" against an individual employee

which was not arguably subject to the exclusive primary jurisdiction of the Labor Board (although the Court did not discuss that question).

The normal situation which involves an alleged denial by a union of the right to fair representation to some members of the bargaining unit is not presented by the second amended complaint. Entirely absent here is the essential requirement that there be an intent to hostilely discriminate against a *portion* of the members of the bargaining unit. Hardcastle v. Western Greyhound Lines, 9 Cir., 303 F. 2d 182, 185. See also Fogg v. Randolph, D. C. N. Y., 244 F. Supp. 885. Under the facts alleged in the instant complaint, *all* the employees represented by District No. 9 were treated alike—not well or properly, and even with hostility but certainly *alike* and without *discrimination,* hostile or otherwise. As we construe the allegations of the second amended complaint, plaintiffs charge in substance that both the employer and the unions failed and refused to bargain collectively and to confer in good faith in respect to wages, hours and other conditions of employment and thereby interfered with the employees of Sterling in the exercise of rights guaranteed to them by § 157.29 U. S. C. A.

The conduct charged in the complaint is the very antithesis of good faith bargaining. We hold that the activities of which plaintiffs complain are at least arguably protected by section 7 of the National Labor Relations Act, 29 U. S. C. A., § 157, or constitute unfair labor practices prohibited by section 8 of the Act, 29 U. S. C. A., § 158, and therefore are subject to the exclusive primary jurisdiction of the National Labor Relations Board, San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775; Local 100 v. Borden, 373 U. S. 690, 83 S. Ct. 1423, 10 L. Ed. 2d 638; Local No. 207 v. Perko, 373 U. S. 701, 83 S. Ct. 1429, 10 L. Ed. 2d 646; and Cosmarck v. Struthers Wells Corp., 412 Pa. 211, 194

A. 2d 325. Cf. Rinker v. Local Union No. 24 of Amalgamated Lithographers, D. C. Pa., 201 F. Supp. 204, 206. This Court does not have jurisdiction to determine the merits of the claim.

In view of our ruling on the jurisdictional issue, we express no opinion on the merits of plaintiffs' claim of collusion and conspiracy. However, for the benefit of those who may have no opportunity to read the second amended complaint and the memoranda filed by plaintiffs, fairness to the defendants requires us to note that plaintiffs have never suggested any possible motive for the serious misconduct attributed to the unions and the union officials, nor even intimated, much less specifically alleged, what conceivable benefit these defendants could derive from the collusion and bad faith charged to them.

There remain for consideration only the claims for relief in respect of alleged breaches of contract, such as failure to pay seniority termination allowances, of which the Court has § 301 jurisdiction. We ruled the issue of seniority termination allowances in our memorandum opinion of January, 1963. Upon consideration of the unassailable proof, we granted Sterling a summary judgment on Count III of the first amended complaint, holding that under the facts the contract did not entitle plaintiffs to the allowances sought.

The labor agreement expired and ceased to be effective February 28, 1963. Seniority termination allowances were payable thereunder only in the event of the termination of employment during the term of the agreement as the direct or indirect result of the permanent closing of the St. Charles plant. The notice to each plaintiff expressly stated that he would be terminated as an employee at the end of the day February 28, 1963. His employment continued to that time. Moreover, all plaintiffs were paid for their employment through February 28, although at

Sterling's direction they performed no productive work processes that day.[4] In granting the summary judgment, we found and ruled that under the undisputed facts, plaintiffs' employment was not terminated during the term of the labor agreement but rather, at the close of business on February 28, 1963, when the contract expired. For such reason, Sterling was not obligated to pay the allowances. We adhere to this ruling.

The rather vague claim of plaintiffs for vacation allowances is premised on the theory of a temporary lay-off on February 27, 1963, as distinguished from a termination of employment at the close of the business day of February 28, 1963. (See in this connection paragraph 5 (e) (3)

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[4] The contractual provisions relating to termination allowances must be read together and reasonably construed to effectuate the manifest intention of the parties as expressed by the language employed. Prentice v. Rowe, Mo. App., 324 S. W. 2d 457, 465. Termination allowances were provided for as a means of at least partially compensating those employees who, by reason of the plant closing before the expiration of the contract, would thereby be deprived of the opportunity to earn wages during the period between the termination of their employment and the plant closing. The provisions relating to termination payments were not intended to grant bonuses to employees who were able to and did receive full compensation for employment to the very end of the contract period. The mere fact that plaintiffs were not required to render services on the last day of their employment does not make them any the less employees of Sterling on that day or constitute an earlier termination of their employment. We cannot agree that their right to substantial additional sums was made to depend on whether the employees were permitted to perform productive work on the last day of the contract period.

We also believe that within the meaning of the language used in the contract construed as a whole, the St. Charles plant was closed down permanently at the expiration of the agreement, and not on February 27, 1963, even though no production processes were performed on the last day of the contract period. And even plaintiffs expressly concede (Paragraph 5 (e) (2) of the second amended complaint) that "Article IV, Seniority, Section 1, subparagraph (j), eliminated the legal liability of the Defendant, Sterling for payment of termination allowances" if the St. Charles plant was closed down permanently "at the expiration" of the contract.

of Count I, setting forth in effect that certain provisions of Article VIII of the collective bargaining agreement had the effect of eliminating liability for vacation time which would otherwise have existed.) The facts which sustain our grant of a summary judgment on the seniority termination claim are equally applicable to the claim for vacation allowances, inasmuch as plaintiffs were not temporarily laid off nor was their employment terminated during the term of the collective bargaining agreement. The disposition we have made of the seniority termination claim necessarily impels the dismissal of the factually related vacation allowance claim.

Other than the foregoing, the only other breach of contract claim is that premised upon Sterling's alleged failure to "bargain" with respect to the plant closing. Plaintiffs do not spell out wherein the collective agreement was breached by the alleged failure to "bargain" nor the legal basis upon which they are entitled to money damages thereby. Plaintiffs' approach is two pronged and, again somewhat inconsistent. They complain in various ways of (1) Sterling's refusal to "bargain" and (2) (very vaguely) of an alleged breach of contract "in various seniority sections thereof" by refusing to employ plaintiffs in any other plants after Sterling closed down the St. Charles plant and "relocated" its departments in other plants.

Insofar as Sterling's refusal to "bargain" is concerned, plaintiffs have referred us to no provision of the contract which was allegedly breached thereby. We again note that even if an employer may be guilty of unfair labor practice by the device of a "runaway shop" (provided his motivation is anti-union), cf. Textile Workers Union v. Darlington Manufacturing Co., 380 U. S. 263, 85 S. Ct. 994, 13 L. Ed. 2d 827, no question of a contract violation is involved where, as here, the contract contains no "runaway shop" clause. And to the extent "bargain-

ing" may be required, an employer's failure in this respect is at most an unfair labor practice and not a contract violation. What plaintiffs are really seeking is to have their employment (or more accurately the fruits of their former employment) extended for an indefinite period after the contract was legally terminated.

We consider, then, whether plaintiffs are entitled as of right to employment in other plants of Sterling. Plaintiffs have cited no specific provision of the contract which grants them an enforceable right to such employment, nor do we find any language "in various seniority sections" of the collective agreement which fairly supports plaintiffs' claim.

The case cited and principally relied upon by plaintiffs, Zdanok v. Glidden Company, 2 Cir., 288 F. 2d 99 is of doubtful authority at best and is distinguishable on its facts. In that case, the contract recited that it was made by the company for and on behalf of its plant facilities located at a specific address at Elmhurst, New York. The majority of the Court held that this narrow geographic description was not to be treated as "setting fixed boundaries upon the scope of the contract" but rather was a "statement of location" and "analogous to the description personae familiar to the law in various situations". 288 F. 2d l. c. 103, 104. Dissenting Chief Judge Lumbard pointed out the absence of any provision of the contract extending the area to which seniority rights were to apply beyond the single plant described, and was of the opinion the agreement did not give the employees the right to follow the work to the site. We agree with Judge Lumbard.

In Oddie v. Ross Gear and Tool Company, 6 Cir., 305 F. 2d 143, the agreement recited that the Company recognized the union as the exclusive representative of its employees of its plant or plants located in the City of

Detroit. The Court held that the seniority and recall-to-work rights granted by the contract had no application to a plant relocated in another area, even during the term of the contract. The Court stated that the agreement in Zdanok "was materially different", there being "no specific geographical limitation such as contained in the agreement in the present case". 305 F. 2d l. c. 149. Whether there is in fact a "material" difference between the two cases we need not rule, although the second Zdanok go-around, 327 F. 2d 944, 952, could see no distinguishing features. In that case, adverting to the great amount of critical discussion the first decision had engendered, the Court conceded that the Oddie decision has created "doubt whether, if other similar contracts should come before us for construction", the same result would be reached. And Judge Lumbard, concurring, made it clear that although the original Zdanok decision should be followed as "the law of the case", that decision "represents the views of but one judge of this circuit and is not entitled to precedential value (even) so far as this circuit is concerned."

Factually, the provisions of the collective agreement involved in this case are far more similar to Oddie than Zdanok. The contract recites that the company recognizes District No. 9 as the exclusive bargaining agent for all employees in the company's St. Charles plant. Of significance also is the further fact that at the time the contract was negotiated, Sterling concededly operated plants in various other areas.

Having read some of the law review articles referred to in the second Zdanok opinion (327 F. 2d, l. c. 952, footnote 11), we prefer to follow Oddie. For whatever it may be worth, we note that certiorari was denied in Oddie, 371 U. S. 941, 83 S. Ct. 318, 9 L. Ed. 2d 275. Even this negligible significance was minimized in the second Zdanok appeal, 327 F. 2d, l. c. 952, footnote 10, because

of the Supreme Court's expressed belief (in ruling the limited issue on which certiorari had been granted in the first Zdanok case) that the Circuit Court had considered and decided the issue as "a question of (New York) state contract law". Glidden Company v. Zdanok, 370 U. S., l. c. 537, 82 S. Ct., l. c. 1466.

The construction we have placed upon the instant contract accords with that of plaintiffs themselves as set forth in paragraph 5 (e)(1) of the second amended complaint which states (omitting words of color), "Article I, Recognition, Page 3 of Exhibit 'A' limited the recognition of the Plaintiffs' labor union to Defendant, Sterling's 'St. Charles Plant' * * * This * * * clause prevented these Plaintiffs from having employment available to them in any other plant of Defendant, Sterling and in particular in any new plant of Defendant, Sterling which was relocated in an area other than St. Charles, Missouri."

We have considered Count I at some length in an effort to discern from the mass of verbiage whether plaintiffs have stated therein some claim within the jurisdiction of the court upon which relief can be granted. We have found none.

The motions to dismiss Count I should be and are hereby sustained.

Count II is merely a rescript of the allegations of Count I, with the addition of a claim for exemplary damages based upon the alleged wilfulness of the conduct alleged. Our disposition of Count I necessarily results in a dismissal of Count II. It is unnecessary therefore to determine whether punitive damages are recoverable, a question the parties have not briefed.

Count V is substantially the same as Count II of the first amended complaint. It realleges the averments of Count I as they relate to the labor organizations and the union representatives, and asserts that the conduct com-

plained of constitutes a breach of the obligation of these defendants to represent plaintiffs fairly and without hostile discrimination. As held in ruling Count I, the activities complained of are arguably and potentially unfair labor practices over which the National Labor Relations Board has exclusive primary jurisdiction. And since Count VI simply involves a demand for punitive damages on account of the alleged wilfulness of the conduct set forth in Count V, our ruling on that Count is also dispositive of Count VI.

In view of the foregoing, the motions to dismiss Counts II, V and VI should be and are hereby sustained.

The numerous other motions filed by defendants have been rendered moot by our rulings on the motions to dismiss.

It is therefore ordered that plaintiffs' motion for a new trial on Count III be overruled, that plaintiffs' motion for summary judgment against defendant Sterling be denied, that defendants' motions to dismiss plaintiffs' second amended complaint be sustained, and that said second amended complaint and each of the counts thereof be dismissed, all at plaintiffs' costs.

APR 7 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 946.

JOHN WOODY
and
192 ADDITIONAL PLAINTIFFS-APPELLANTS
vs.
STERLING ALUMINUM PRODUCTS, INC.,
and
INTERNATIONAL ASSOCIATION OF MACHINISTS
and
DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS,
and
LOCAL LODGE NO. 41 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
and
LARRY CONNORS, DIRECTING BUSINESS REPRESENTATIVE, DISTRICT NO. 9, I. A. OF M.,
and
RUSSELL DAVIS, BUSINESS REPRESENTATIVE, DISTRICT NO. 9, I. A. OF M.,
Defendants-Appellees.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Defendants-Appellees.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The petitioners herein pray this Court to grant a rehearing of its order of March 13th, 1967, denying a writ

of certiorari, 87 S. Ct. 1026 (1967). Petitioners further pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit as prayed in their petition for certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

Circumstances of substantial and controlling effect have arisen during the time that the petition for writ of certiorari herein was pending. The decision and majority opinion of this Court entered on February 27th, 1967, in the case of Vaca v. Sipes, 87 S. Ct. 903 (1967), thoroughly, favorably and affirmatively answers every question presented for determination by these petitioners. The ruling of the Eighth Circuit Court of Appeals in this case is now in direct conflict with this Court's opinion in Vaca v. Sipes (supra).

This case was cited "CF", in the Vaca v. Sipes opinion by Justice Fortas "concurring in the result" with the majority opinion (87 S. Ct. at 921).[1] Petitioners urge the grant of rehearing in order to bring a determination of the issues raised herein into conformity with this Court's mandate in Vaca v. Sipes and thereby restore uniformity to the federal common law of labor relations.

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[1] Petitioners have previously suggested simultaneous consideration of this case along with its companion case of Brown, et al., v. Sterling, etc., cert. den. 87 S. Ct. 1023. The Brown case was also cited "CF." in the opinion by Justice Fortas in Vaca v. Sipes, 87 S. Ct. at 922, footnote No. 3. However, the Brown citation in Vaca v. Sipes has consistently erroneously designated the Brown certiorari petition as "No. 946, O. T. 1966". The correct Brown certiorari designation is **No. 937**, O. T. 1966. A petition for rehearing in the Brown case is being filed simultaneously with this petition.

CONCLUSION.

For the reasons set forth herein and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such re-hearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

.....

JEROME J. DUFF,
Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Jerome J. Duff,
Counsel for Petitioners.

Certificate of Service.

State of Missouri, } ss.
City of St. Louis. }

I, Jerome J. Duff, of counsel for the Petitioners herein and attorney of record for the Petitioners in the Court below, depose that on the 6th day of April, 1967, I served four copies of the foregoing Petition for Rehearing on the Respondents as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Mr. William Stix, Attorney of Record for Respondent Company, 408

Pine Street, St. Louis, Missouri 63101, and Messrs. Bartley, Siegel and Bartley, Attorneys for Respondent Unions, 130 South Bemiston Avenue, Clayton, Missouri 63105.

.....

Jerome J. Duff.

Subscribed and sworn to before me at St. Louis, Missouri, on this 6th day of April, 1967.

.....

Notary Public.

My Commission Expires:

.....